(25,740)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 910.

ALASKA PACIFIC FISHERIES, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF ALASKA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page
Captic	*a*
Addresses of counsel	1
Transcript of record from the district court of the United States for the district of Alaska	1
Præcipe for record	1
Complaint	2
Demurrer	4
Answer	6
Reply	13
Judgment	14
Bill of exceptions	18
Demurrer	19
Stipulation of facts	21
Amendment to stipulation of facts	25
Conclusions of law requested by defendant	26
Order settling bill of exceptions	31
Petition for writ of error and allowance	33
Assignment of errors	35

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1917.

	Page
Bond on writ of error	41
Writ of error	43
Citation and service	45
Memorandum opinion on demurrer	47
Opinion	67
Clerk's certificate	71
Order of submission	75
Opinion, Hunt, J.	77
Judgment	94
Order denying petition for a rehearing	96
Orders staying issuance of mandate, &c.	97
Petition for writ of error	98
Order allowing writ of error, &c.	98
Assignment of errors	99
Bond on writ of error	104
Præcipe for record	111
Clerk's certificate	114
Writ of error	117
Citation and service	120

No. 2709

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

[Names and Addresses of Counsel.]

HELLENTHAL & HELLENTHAL, Juneau, Alaska,
Attorneys for Plaintiff in Error.

JOHN H. COBB, Juneau, Alaska,
Attorney for Defendant in Error.

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1325–A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES,

Defendant.

Praecipe [for Transcript of Record].

Kindly prepare certified copies for transmission to the United States Circuit Court of Appeals in connection with your return of the Writ of Error herein as follows: Original Complaint, Demurrer to Complaint, Answer, Reply, Findings of Fact and Conclusions of Law, and Judgment (all in one), Bill of Exceptions, Petition for Writ of Error and Order allowing same, Assignment of Errors, Bond on Writ of Error, Writ of Error and Citation on Writ of Error. Two Opinions.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

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*Page-number appearing at foot of page of original certified Record.

Filed in the District Court, District of Alaska, First Division. Dec. 10, 1915. J. W. Bell, Clerk. By L. E. Spray, Deputy. [1a*]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1325–A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Complaint.

The above-named plaintiff complaining of the above-named defendant, for cause of action alleges:

I.

The defendant is a corporation, duly incorporated, and owning property and engaged in the fishing business in the Territory of Alaska.

II.

That during the month of June, 1915, and continuously up to the present time, the defendant was engaged in and prosecuting and attempting to prosecute the business of fishing by means of fish-traps situate in the waters of Alaska.

That during all said period the defendant was engaged in operating twenty-two (22) fish-traps, the precise locations of which said traps are to the plaintiff unknown, but they are all within the waters of Southeastern Alaska and subject to the tax hereinafter alleged.

III.

That by an act of the Alaska legislature, approved [2] April 29th, 1915, entitled "An act to establish a system of taxation, create revenue, and provide for collection thereof, for the Territory of Alaska, and for other purposes; and to amend an act entitled "An act to establish a system of taxation, create revenue and provide for collection thereof for the Territory of Alaska, and for other purposes," approved May 1, 1913, and declaring an emergency,"—each and every one of said traps became and is subject to the payment of a license tax of One Hundred Dollars ($100) each for the year 1915, which said tax, by the terms of said act, became due and payable on the 1st day of July, 1915.

IV.

That the defendant, though prosecuting the business aforesaid for the current season of fishing, has failed, neglected and refused to pay said license tax or any part thereof.

WHEREFORE, plaintiff sues and prays judgment for the sum of Twenty-two Hundred Dollars ($2,200), with interest thereon at the rate of eight per cent per annum from the 1st day of July, 1915, and all costs and disbursements herein incurred.

J. H. COBB,

Chief Counsel for the Territory of Alaska. [3]

United States of America,
Territory of Alaska,—ss.

J. H. Cobb, being first duly sworn, on oath deposes and says: I am chief counsel for the Territory of

Alaska. The above and foregoing complaint is true as I verily believe.

J. H. COBB.

Subscribed and sworn to before me this 7th day of July, A. D. 1915.

[Notarial Seal] E. L. COBB,
Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy.

[Endorsed]: Original No. ——. In the District Court for the Territory of Alaska, Division No. 1, at Juneau. The Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Complaint. J. H. Cobb, Chief Counsel for the Territory of Alaska. [4]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1325–A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Demurrer.

Comes now the above-named defendant and demurs to the complaint of the plaintiff herein, and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That the act of the Alaska legislature, approved April 22, 1915, referred to in the complaint and upon which the alleged liability of the defendant is based, is invalid and void.

III.

That the act of the Alaska legislature approved April 22, 1915, referred to in the complaint, is in conflict with the Organic Act, the Laws of the United States and the Constitution of the United States, and is such that the territorial legislature did not possess the power and authority under the Organic Act to enact the same. [5]

IV.

That the tax attempted to be laid by the act referred to in the complaint is not uniform upon the same class of subjects in this that an attempt is made to tax fish-traps and gill-nets while seines are not taxed. Thereby imposing a burden on those fishing by means of traps and gill-nets, not imposed upon those fishing by means of seines, and the act is for that reason void to the extent that fish-traps are sought to be taxed.

V.

That the act referred to in the complaint is void for the reason that it is an attempt to lay and collect a tax without any reference to the value of the thing taxed, contrary to the provisions of the Organic Act in that regard.

VI.

That the tax imposed by the act, refered to in the complaint, is in fact a specific tax on property, and as such is levied without any reference to the value of the property sought to be taxed, to wit, the fish-traps, contrary to the provisions of the Organic Act in that regard.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

Due service by copy admitted this 27th day of July, 1915.

J. H. COBB,
Attorney for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Jul. 29, 1915. J. W. Bell, Clerk. By ————, Deputy **[6]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case. No. 1325-A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

The defendant admits that it is a corporation duly

incorporated and owning property in the Territory of Alaska, and engaged in the fishing business in said Territory, as said fish business is hereinafter more particularly described.

II.

The defendant denies that during the month of June, 1915, or at any other time, it was engaged in prosecuting, or attempting to prosecute, the business of fishing by means of fish-traps, situate in the waters of Alaska or elsewhere, and in this connection the defendant avers:

That it is the owner of salmon cannaries, situate in Southeastern Alaska, and that it is engaged in catching, packing and canning salmon and that in connection with the operation of such canneries it catches, packs, cans and ships salmon; that it is the owner of eighteen (18) fish-traps, situate in the waters of Southeastern Alaska, and that each [7] and all of said fish-traps are appliances used by it in connection with its operation of said canneries and that said traps and all of them are part of the cannery property used exclusively for the purpose of catching fish to be canned in the defendant's canneries;

That the defendant is not engaged in the business of operating fish-traps, or in the business of fishing by means of fish-traps; that it does not sell any of the fish caught in any of its said traps until the same have been canned at its said canneries and makes no use whatsoever of said fish-traps, except in the operation of its said canneries.

Further answering paragraph two (2) of the com-

plaint of plaintiff herein, the defendant denies that it is the owner of, or that it operates, twenty-two (22) fish-traps but avers that it is the owner of eighteen (18) fish-traps used by it as in this paragraph above specified. In this connection the defendant further avers:

That it has complied with all the provisions of chapter three, title seven of the Compiled Laws of Alaska, relating to fish and fisheries, including the provisions of sections 259, 260, 261, 262, 263, 264, 265, 267, 268, 269, 270, 271, 272, 273, 274, 275 and 275–a, and has paid license taxes on its business and output as by said act of Congress required, and has in all respects complied therewith.

III.

Answering paragraph three (3) of plaintiff's complaint the defendant avers:

That it admits that the territorial legislature of the Territory of Alaska passed the act referred to in said [8] paragraph, but the defendant denies that it is the owner of any fish-traps subject to the payment of any license tax under said act, and in this connection, the defendant further avers:

That said act is invalid and void, among others, for the reasons following:

First. That said act attempts to alter, amend and change the fish laws passed by the Congress of the United States, prior to the adoption of the Organic Act and in force at the time said act was adopted, which said attempt is contrary to the provisions of said Organic Act and renders the act void, as an act passed without authority.

Second. That the purported license tax sought to be collected in this action is not a license but a tax and is sought to be collected in violation of the provisions of the Organic Act of the Territory of Alaska in this that the act is a revenue measure pure and simple, and that the license sought to be collected *are* not sought to be collected for the purpose of regulation, but for the purpose of taxation only; that the amount imposed is far in excess of the amount required to issue the license, to regulate and inspect the thing sought to be licensed and to do such other things as might be done by the Territory under its police powers; and that the express object of the act is not regulation, but taxation, and as such is in violation of the provisions of the Organic Act, which requires, "That all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof. No tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year." **[9]**

And further that said attempt to tax is in violation of the last quoted provision of the Organic Act in this, the natural conditions in Southeastern Alaska are such that it is practical to catch salmon by means of traps and gill-nets, and such that a seine cannot be used, while the natural conditions in Western Alaska are such that it is not practical to catch fish by means of traps and gill-nets, but the seine is the device used, in the last mentioned locality for that purpose. There are a great many sal-

mon canneries in Southeastern Alaska and the fish canned in these canneries are nearly all caught by means of traps and gill-nets. There are also a large number of canneries in Western Alaska and the fish there canned are nearly all caught by the use of seines.

That the defendant owns three canneries, all of which are situate in Southeastern Alaska, and all of which are so situate that the fish canned at said canneries must be caught either by means of a trap or gill-net, since the natural conditions in the Territory from which these fish must come do not admit of the use of a seine.

That to the Westward, along the Alaskan coast, different conditions prevail; that the practical methods of fishing there is by means of seines; that in that locality seines are almost exclusively used by the canneries in procuring fish to be canned and packed at the canneries there situate; that if this act should be enforced and the defendant be required to pay the tax therein assessed against it because of the fact that it employes fish-traps and gill-nets in order to supply its canneries with fish, it would be greatly handicapped in meeting in the market its competitors, who **[10]** operate canneries to the westward along the Alaskan coast and in the Alaskan waters, where the use of seines is practical and where the fish are caught and the canneries supplied by means of the use of seines.

That said tax for the reasons stated is not uniform upon the same class of subjects; is not assessed according to the actual value thereof and is levied

without reference to whether it is in excess of one per cent upon the assessed valuation of the property, and without making any assessment whatsoever, and that as to many of the traps owned by the defendant, the tax of one hundred ($100) dollars per trap greatly exceeds one per cent upon the actual value of said traps in that some of the defendant's traps are not worth to exceed twenty-five hundred ($2,500) dollars.

That the defendant cannot supply its canneries with fish except by using traps and gill-nets, which are taxed under the provisions of the act referred to in the complaint, while its competitors operating canneries in Western Alaska supply their canneries with fish by the use of seines, the use of which the natural conditions in that locality permit; that the defendant and all others similarly situated are obliged to sell their fish in the same market where the fish canned by the canneries situate in Western Alaska is marketed. That by reason of these facts the defendant is denied the privilege of fishing without paying the tax on trap and gill-nets exacted by said act, while its competitiors are allowed to exercise the privilege of fishing freely;

That by reason thereof, as well as the other matters and things hereinbefore set forth, said act is in violation of the fourteenth amendment to the Constitution of the United States. **[11]**

IV.

Replying to paragraph four of the plaintiff's complaint, the defendant denies that it is prosecuting the business therein referred to, and avers that it is

engaged in the business hereinbefore set forth, prosecuted in the manner hereinbefore set forth, but admits that it has failed and refuses to pay the license tax sought to be collected by this action, or any part thereof, for the reasons herein stated.

And for further defense to the allegations of the complaint herein, the defendant avers:

That the act upon which the complaint herein is based and under which the prosecution is had was enacted or claimed to be enacted by the legislature of the Territory of Alaska in the year 1915.

That the session of the legislature which passed or claimed to have passed the above-entitled act convened on the first Monday in March, 1915, in the city of Juneau, Alaska, and continued in session for a period of sixty days, during which period they failed to pass and enact the act above referred to, and that said act, upon which the prosecution herein is had, was passed after the legislature had been in session for more than sixty days, and that the Governor of the Territory of Alaska did not call an extraordinary session to pass said act.

WHEREFORE, the defendant prays that the plaintiff's complaint be dismissed; that it take nothing by reason thereof; and that it have and recover from the plaintiff its costs and disbursements herein incurred.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant. **[12]**

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 26, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy.

ORIGINAL No. 1325–A. In the District Court for the Territory of Alaska, Division No. 1. The Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Answer. Hellenthal & Hellenthal, Attorneys for Defendant. Office: Juneau, Alaska.

Due service by copy of the within admitted this 26th day of Aug. 1915.

J. H. COBB,
Attorney for Plaintiff. **[13]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1325–A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Reply.

Now comes the plaintiff by J. H. Cobb, Chief Counsel for the Territory of Alaska, and for reply to the affirmative answer of the defendant alleges:

The plaintiff denies all and singular the allegations in said affirmative answer contained.

J. H. COBB,
Chief Counsel.

United States of America,
Territory of Alaska,—ss.

J. H. Cobb being first duly sworn on oath deposes

and says: I am the chief counsel for the Territory of Alaska. The above and foregoing reply is true as I verily believe.

J. H. COBB.

Subscribed and sworn to before me this 11th day of November, 1915.

E. L. COBB.
Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Filed in the District Court, District of Alaska, First Division. Nov. 13, 1915. J. W. Bell, Clerk. By L. E. Spray, Deputy. **[14]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1325–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Judgment.

This cause came on regularly for trial upon the complaint, answer and reply; and thereupon came the plaintiff by Mr. J. H. Cobb, and the defendant by Messrs. Hellenthal & Hellenthal, and all parties announced ready for trial; and filed a stipulation in writing waiving a jury and submitting the cause to the Court; and the respective parties also made, signed and filed their stipulation in writing as to all

facts in the case, of which stipulation the following also was a part to wit: "If the Court shall find under the law that judgment should go for the plaintiff, said judgment shall be for the sum of Nineteen Hundred Dollars ($1,900) with interest thereon from July 1st, 1915, from which judgment a writ of error or appeal may be prosecuted as provided by law"; The said facts so stipulated are as follows, to wit:

I.

The defendant, The Alaska Pacific Fisheries, is a corporation duly incorporated and owning property and doing business in the Territory of Alaska.

II.

The said defendant is the owner of 19 fish-traps situate within the waters of Southeastern Alaska, which **[15]** said traps and each and all of them it operated during the fishing season of 1915, to wit, during the months of June, July and August, taking fish therein.

III.

That none of the fish taken by the defendant in any one of its said fish-traps operated by it as aforesaid, was sold by the defendant prior to being canned, but all the fish so caught were utilized by the defendant in connection with the operation of certain canning plants owned by it in which said fish were canned and thereafter sold as canned salmon, and the defendant has not otherwise engaged in the fish-trap business.

IV.

That some of the canneries in the Territory of Alaska are so situate that because of natural con-

ditions they are obliged to supply the fish canned by resorting to the use of fish-traps, while others are so situate because of natural conditions that the fish can be supplied in no other practical manner except by the use of gill-nets, while still others are so situate that the fish cannot be supplied except by the use of seines; that the canneries of the defendant are so situate that seines cannot be practically used in connection with the catching of the fish canned or in connection with the furnishing of the fish supplied for its canneries, but it is obliged to resort to the use of fish-traps for that purpose.

V.

The defendant has complied with all the provisions of chapter 3, title 7, of the Compiled Laws of the Territory of Alaska relating to fish and fisheries including the provisions of sections 259 to 275–A inclusive, and has paid the license tax provided for by said sections. **[16]**

VI.

The defendant has not paid the tax sued for in this action for 1915, or any part thereof.

VII.

The second session of the legislature which passed the act which forms the basis of this action, to wit, chapter 76, Session Laws of Alaska, 1915, convened on the 1st day of March, 1915, at 12 o'clock noon; that on the 29th day of April, 1915, said legislature adjourned, *sine die,* at 12 o'clock midnight, according to the official time-piece of said legislature, that is to say, the clocks hanging in the halls of the two Houses of the legislature were stopped or turned

back by the sergeant-at-arms just prior to the hour of 12 o'clock midnight of April 29th, 1915, and thereafter between the hours of 3 and 4 o'clock A. M., sun time, of April 30th, 1915, while the clocks in said halls of the legislature still indicated prior to midnight, being stopped or turned back as aforesaid, the said act, namely chapter 76 of the Session Laws of Alaska, 1915, was finally passed by both Houses of the legislature and approved by the Governor and was enrolled and filed in the office of the Secretary of State for the Territory as it now appears in the printed volume of the Session Laws of Alaska, 1915, chapter 76; that the Governor of the Territory of Alaska did not call an extra session to pass said act.

VIII.

Some of the said traps of defendant are worth upwards of $10,000 and some are worth not to exceed $1,000.

And from the foregoing the Court finds as facts herein the matters and things in said stipulation, contained; and from the facts so found and the stipulation aforesaid the Court concludes as a matter of law that the plaintiff is entitled to judgment for the sum of Nineteen Hundred **[17]** and Sixty-three Dollars ($1,963) and costs, to which ruling of the Court the defendant then and there excepted.

IT IS THEREFORE CONSIDERED BY THE COURT, and is so ordered and adjudged that the plaintiff, the Territory of Alaska, do have and recover of and from the defendant the Alaska Pacific Fisheries, a corporation, the sum of Nineteen Hundred and Sixty-three Dollars ($1,963) with interest

thereon from the date hereof at the rate of eight per cent per annum, and all costs incurred, for all of which let execution issue.

Defendant is allowed thirty days from this date in which to file bill of exceptions.

Dated this 1st day of December, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 2, 1915. J. W. Bell, Clerk. By L. E. Spray, Deputy. **[18]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case. No. 1325–A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the defendant herein, duly and regularly and within the time prescribed therefor, filed its demurrer, which is in words and figures as follows:

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1325–A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES,
a Corporation,

Defendant.

Demurrer [in Bill of Exceptions].

Comes now the above-named defendant and demurs to the complaint of the plaintiff herein, and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That the act of the Alaska Legislature, approved April 22, 1915, referred to in the complaint and upon which the alleged liability of the defendant **[19]** is based, is invalid and void.

III.

That the act of the Alaska legislature approved April 22, 1915, referred to in the complaint, is in conflict with the Organic Act, the Laws of the United States and the Constitution of the United States, and is such that the territorial legislature did not possess the power and authority under the Organic Act to enact the same.

IV.

That the tax attempted to be laid by the act referred to in the complaint is not uniform upon the same class of subjects in this that an attempt is made to tax fish-traps and gill-nets, while seines are not taxed. Thereby imposing a burden on those fishing by means of traps and gill-nets, not imposed upon those fishing by means of seines, and the act is for that reason void to the extent that fish-traps are sought to be taxed.

V.

That the act referred to in the complaint is void for the reason that it is an attempt to lay and collect a tax without any reference to the value of the thing taxed, contrary to the provisions of the Organic Act in that regard.

VI.

That the tax imposed by the act, referred to in the complaint, is in fact a specific tax on property, and as such is levied without any reference [20] to the value of the property sought to be taxed, to wit, the fish-traps, contrary to the provisions of the Organic Act in that regard.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

That thereafter and on the 11th day of August, A. D., 1915, this cause came on regularly for hearing upon the demurrer so filed to the complaint, both parties being represented by counsel, and the matter having been fully argued and presented to the Court, the Court overruled said demurrer, to which ruling and order of the Court the defendant, by counsel,

then and there excepted, which exception was then and there allowed by the Court.

BE IT FURTHER REMEMBERED that thereafter the defendant filed its answer, to which a reply was duly filed by the plaintiff, whereupon the cause being at issue upon a question of fact, the parties duly and regularly by a stipulation in writing waived a jury, and thereupon the parties duly and regularly entered into a stipulation as to all the facts in the case, which stipulation is in words and figures as follows:

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1325–A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES,
a Corporation,

Defendant.

Stipulation [of Facts].

It is hereby stipulated and agreed by and between the plaintiff and defendant, by their respective **[21]** counsel, that this case shall be tried upon the following agreed facts:

I.

The defendant, The Alaska Pacific Fisheries, is a corporation duly incorporated and owning property and doing business in the Territory of Alaska.

II.

The said defendant is the owner of 19 fish-traps situate within the waters of Southeastern Alaska, which said traps and each and all of them it operated during the fishing season of 1915, to wit, during the months of June, July and August, taking fish therein.

III.

That none of the fish taken by the defendant in any one of its said fish-traps operated by it as aforesaid, was sold by the defendant prior to being canned, but all the fish so caught were utilized by the defendant in connection with the operation of certain canning plants also owned by it in which said fish were canned and thereafter sold as canned salmon, and the defendant has not otherwise engaged in the fish-trap business.

IV.

That some of the canneries in the Territory of Alaska are so situate that because of natural conditions they are obliged to supply the fish canned by resorting to the use of fish-traps, while others are so situate because of natural conditions that the fish can be supplied in no other practical manner except by the use of gill-nets, while still others are so situate that the fish cannot be supplied except by the use of seines; that the canneries of the defendant are so situate that seines cannot be practically used in connection with the catching of the fish canned or in connection with the furnishing of the fish supplied for its canneries, but it is obliged to resort to the use of fish-traps for that purpose.

V.

The defendant has complied with all the provisions of chapter 3, title 7, of the Compiled Laws of the Territory of Alaska relating to fish and fisheries including the provisions of sections 259 to 275–A inclusive, and has paid the license tax provided for by said sections. **[22]**

VI.

The defendant has not paid the tax sued for in this action for 1915, or any part thereof.

VII.

The second session of the legislature which passed the act which forms the basis of this action, to wit, chapter 76, Sessions Laws of Alaska, 1915, convened on the 1st day of March, 1915, at 12 o'clock noon; that on the 29th day of April, 1915, said legislature adjourned, *sine die,* at 12 o'clock midnight according to the official time-pieces of said legislature, that is to say, the clocks hanging in the halls of the two Houses of the legislature were stopped or turned back by the sergeant-at-arms just prior to the hour of 12 o'clock midnight of April 29th, 1915, and thereafter between the hours of 3 and 4 o'clock A. M., sun time, of April 30th, 1915, while the clocks in said halls of the legislature still indicated prior to midnight, being stopped or turned back as aforesaid, the said act, namely chapter 76 of the Session Laws of Alaska, 1915, was finally passed by both Houses of the legislature and approved by the Governor and was enrolled and filed in the office of the Secretary of State for the Territory as it now appears in the printed volume of Session Laws of Alaska, 1915,

chapter 76; that the Governor of the Territory of Alaska did not call an extra session to pass said act.

VIII.

Some of the said traps of defendant are worth upwards of $10,000 and some are worth not to exceed $1,000.

IX.

It is further stipulated that upon the filing hereof the amended complaint shall be withdrawn; that a real controversy in good faith exists between the Territory and the Defendant, as to the meaning, scope and validity of said chapter 76, and this agreement as to the facts is made for the purpose of settling said controversy without the necessity, trouble and expense of introducing evidence; that the Territory waives all claim for penalties provided in said law, and only asks judgment for the amount of the tax, and legal interest from July 1, 1915.

The above and foregoing stipulation of facts are subject to objection from either party as to their incompetency, irrelevancy or immateriality the same as might be imposed on the trial [23] to evidence tending to prove such facts.

The parties make the following legal contentions respectively:

It is contended by the plaintiff that the said chapter 76, of the Session Laws of 1915, is a valid law and that thereunder the plaintiff is entitled to have and recover of and from the defendant the sum of $1,900 with 8 per cent interest thereon from and after July 1, 1915.

It is contended on the part of the defendant that

it is not indebted to the plaintiff in any sum whatsoever, for the reason, first, that it does not come within the provisions of chapter 76 of the Session Laws of 1915, and second, because the said last-mentioned act, and especially those provisions relied upon as the basis of this action, is and are void and invalid for the reason referred to in the answer herein, as well as for other reasons not specifically in said answer set forth.

J. H. COBB,
Chief Counsel for the Territory of Alaska.
HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

Said stipulation having been filed and presented to the Court, it was further agreed:

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1325–A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES COMPANY, a Corporation,

Defendant.

Amendment to Stipulation [of Facts].

The parties hereto agree that the stipulation heretofore filed herein and on which this case is to be tried shall be, and the same is hereby, amended by adding thereto the following clause:

"If the Court shall find, under the law, that judgment should go for plaintiff, said judgment shall be for the sum of $1,900, with interest thereon [24] from July 1, 1915; from which judgment a writ of error or appeal may be prosecuted as provided by law."

Dated this 20th day of November, 1915.

J. H. COBB,
Attorney for Plaintiff.
HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

[Conclusions of Law Requested by Defendant.]

Whereupon, the Court having adopted the facts as stipulated as the findings of the Court, the defendant asked the Court to conclude therefrom as a matter of law, as follows:

"Conclusion of Law No. 1, as Requested by Defendant.

That the act of the Territorial Legislature of the Territory of Alaska entitled, 'An Act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska and for other purposes, and to amend an act entitled, "An act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska and for other purposes, approved May 1, 1913, and declaring an emergency;" which said act was approved May 29, 1915, and forms the basis of this action is inoperative, invalid and void, as far as it relates to the facts in this case."

which said conclusion of law the Court then and

there refused to adopt, then and there refusing to so conclude, to which ruling and order of the Court the defendant, by counsel, then and there excepted on the ground that said act of the territorial legislature referred to in said conclusion of law No. 1, which forms the basis of this action, is invalid and void, especially in so far as it relates to the facts in this case, for the reasons, among [25] others, enumerated in the answer herein, said act being in conflict with the provisions of the Organic Act of the Territory of Alaska, as well as the provisions of the Constitution of the United States for the reasons set out in detail in the answer, which are to be regarded as incorporated herein; and it is further invalid and void as having been passed and enacted by the territorial legislature of Alaska without authority and in violation of the limits imposed upon the authority of the legislature by the Organic Act of the Territory, providing for the legislature and defining its powers, and further for the reason that said pretended act was passed by the legislature after the period during which legislation could be enacted by the said legislature had expired and at a time when said legislature was not legally in session and had no legal status or existence, which said exception so taken by the defendant was then and there allowed by the Court.

Then and there also the Court having adopted the facts as stipulated by the parties as its findings as aforesaid, the defendant asked the Court to adopt as its conclusion of law, and conclude as a matter of law from the facts stipulated and found, as follows:

"Conclusion of Law No. 2, Requested by Defendant.

> That the defendant is not indebted to the plaintiff in any sum whatsoever, and that the complaint should be dismissed and the plaintiff recover nothing by reason thereof."

which said request made by the defendant was then and there denied by the Court, and the Court refused to adopt said conclusion or to conclude from the facts found as requested, **[26]** to which ruling and order of the Court the defendant, by counsel, then and there excepted on the ground and for the reason that under the facts as stipulated to by the parties and as found by the Court, it appears that the act of the legislature, which forms the basis of the action, the title of which is set out in full in conclusion of law No. 1 as proposed by defendant, is void and invalid for the reasons stated in the exception taken to the refusal of the Court to adopt said conclusion of law No. 1, as well as for the reasons stated in the answer herein and other reasons not specifically set forth, and said exception is taken on the further ground that even though said act were valid and in force it is shown conclusively by the facts as stipulated to by the parties and as found by the Court that the defendant is not liable to the plaintiff in any sum whatsoever by reason thereof, it being shown that the defendant is not engaged in any business or occupation taxed or licensed by said act and is not engaged in the business of "fish-traps," and is not liable for any taxes or license fees due under the provisions of said act, which said exception was then and there allowed by the Court.

And the Court having found the facts as stipulated as aforesaid, the defendant then and there further asked the Court to adopt as its conclusion, and conclude as a matter of law as follows: [27].

"Conclusion of Law No. 3, as Requested by Defendant.

That the defendant should have judgment against the plaintiff for its costs and disbursements in this behalf incurred."

which said request so made by the defendant the Court then and there denied, to which ruling and order of the Court the defendant, by counsel, then and there excepted on the ground that under the facts as stipulated and as found by the Court the plaintiff is not entitled to recover from the defendant, but defendant is shown to be entitled to a judgment for costs against the plaintiff, the defendant being not liable to the plaintiff in the sum sued for or any other sum whatsoever, which said exception was then and there allowed by the Court.

[Findings and Conclusion of Law]

Whereupon, the Court having adopted the facts as stipulated to by the parties as the findings of the Court concluded as a matter of law as follows:

"And from the foregoing facts and stipulation the Court concludes as a matter of law that the plaintiff is entitled to judgment for the sum of $1,963 and costs."

to which said ruling and order of the Court in adopting the conclusion of law so adopted and concluding as a matter of law from the facts found as above set forth, the defendant, by counsel, then and there

objected on the ground that the act of the legislature of the Territory of Alaska, entitled "An act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska and for other purposes, and to amend an act entitled, 'An act to establish a system of taxation, [28] create revenue and provide for the collection thereof for the Territory of Alaska and for other purposes, approved May 1, 1913, and declaring an emergency'" the same being chapter 76 of the Session Laws of the Session of the year 1915, and being the law which forms the basis of this action, is void and invalid so far as it affects the defendant in this action and in so far as it relates to the cause of action sued upon, for the several reasons, among others set forth in detail in the answer herein and for the reason that the same is in conflict with the Organic Act of the Territory and the Constitution of the United States; that in passing and adopting the same the legislature acted beyond its authority as defined and limited in the Organic Act of the Territory creating the legislature and defining its powers; for the further reason that the pretended act above referred to was passed and adopted by the legislature after the same had, as a matter of law, adjourned and while said legislature had no existence as a legislative body, and no authority to pass or enact laws; said conclusion adopted by the Court is objected and excepted to for the further reason that even though the act of the legislature above referred to, and which is the basis of this action, should be construed as valid, the facts as stipulated to and as

found by the Court conclusively show that the defendant is not liable to the plaintiff for taxes or license fees thereunder; that the matters and things done by the defendant and charged against it, as stipulated to by the parties, and as found by the Court, conclusively show that the defendant did not do or perform any act or engaged in any [29] business or occupation that required it to pay the license fee or tax sued for, or any part thereof, or make it liable for the same, or any part thereof, which said objection so made by the defendant was then and there overruled by the Court and the Court adopted as its conclusion, the conclusion of law last above referred to, to which said objection was made, to which ruling and order of the Court the defendant, by counsel, then and there excepted on each of the grounds and for all the reasons stated in the objection to the making of said conclusion as above narrated, which exception was then and there duly and regularly allowed by the Court.

And the defendant having asked the Court to settle allow and sign the above and foregoing bill of exceptions and order the same made a part of the record herein,

[Order Settling and Allowing Bill of Exceptions, etc.]

NOW, THEREFORE, it is ORDERED by the Court that the above and foregoing bill of exceptions be settled, signed and allowed as a true, full and correct bill of exceptions herein, the same having been duly presented within the time allowed therefor by the Court, and the Court hereby certifies that the

foregoing bill of exceptions contains a record of all the proceedings had herein; that no evidence was offered or received in said cause; but that the same was tried upon the facts as stipulated to by the parties, and that the foregoing bill of exceptions contains all the facts so stipulated to and all the proceedings had in this cause; it is accordingly ORDERED that the above and foregoing bill of exceptions be made a part of the record herein.

Done in open court this 9th day of December, 1915.

ROBERT W. JENNINGS,
District Judge. [30]

O K. COBB.

Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk. By ————, Deputy.

[Endorsed]: Original. No. 1325-A. In the District Court for the Territory of Alaska, Division No. 1. Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Bill of Exceptions. Hellenthal & Hellenthal, Attorneys for Alaska Pacific Fisheries. Office; Juneau, Alaska. [31]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1325—A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

Case No. 1325–A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error,

Petition for Writ of Error and Allowance Thereof.

To the Honorable ROBERT W. JENNINGS, Judge of the District Court for the Territory of Alaska, Division Number One:

Now comes the above-named Alaska Pacific Fisheries, a corporation, the plaintiff in error herein, by its attorneys, Hellenthal & Hellenthal, and complains that in the record and proceedings had in the District Court for the Territory of Alaska, Division Number One, in the case of the Territory of Alaska, plaintiff, and defendant in error, against the Alaska Pacific Fisheries, defendant, and plaintiff in error, and also in the rendition of the judgment in said cause in the District Court for the Territory of Alaska, Division Number One, against the Alaska Pacific Fisheries on the 2d day [32] of December, 1915, wherein the District Court for the Territory of Alaska adjudged the defendant, the Alaska Pacific Fisheries, to be indebted to the plaintiff, the Territory of Alaska, in the sum of $1,963, and wherein the plaintiff, the Territory of Alaska, was given judgment against the defendant, the Alaska

Pacific Fisheries, for the sum of $1,963 and costs, taxed at $——, manifest error hath happened to the great damage of said Alaska Pacific Fisheries, as will more fully appear from the assignment of errors filed herewith.

WHEREFORE the Alaska Pacific Fisheries prays for the allowance of a writ of error, and for an order fixing the amount of the bond in said cause, and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 9th day of December, A. D., 1915.

HELLENTHAL & HELLENTHAL,
Attorneys for Alaska Pacific Fisheries.

The above petition for writ of error is allowed and the bond fixed at Two Thousand Five Hundred ($2,500) Dollars, to be approved by the clerk of the above-entitled court.

Dated this 9th day of December, 1915.

ROBERT W. JENNINGS,
Judge. [33]

Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk. By ————, Deputy.

[Endorsed]: Original. No. 1326–A. In the District Court for the Territory of Alaska Division No. 1. The Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Petition for Writ of Error and Allowance Thereof. Hellenthal & Hellenthal, Attorneys for Alaska Pacific Fisheries. Office: Juneau, Alaska. [34]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

United Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco, California.

Case No. 1325.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Assignment of Errors.

Comes now the Alaska Pacific Fisheries, the plaintiff in error and assigns the following errors committed by the Court in connection with the trial and rendition of judgment herein, the errors so assigned being the errors which the plaintiff in error intends to urge before the United States Circuit Court of Appeals for the Ninth Circuit, and are the errors relied upon for a reversal of the judgment herein:

FIRST ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One erred in overruling the defendant's demurrer to the plaintiff's complaint, which said demurrer was and is in words and figures as follows: **[35]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,

Defendant.

DEMURRER.

Comes now the above-named defendant and demurs to the complaint of the plaintiff herein, and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That the act of the Alaska legislature, approved April 22, 1915, referred to in the complaint and upon which the alleged liability of the defendant is based, is invalid and void.

III.

That the act of the Alaska legislature approved April 22, 1915, referred to in the complaint, is in conflict with the Organic Act, the Laws of the United States and the Constitution of the United States, and is such that the Territorial Legislature did not possess the power and authority under the Organic Act to enact the same.

IV.

That the tax attempted to be laid by the act re-

ferred to in the complaint is not uniform upon the same class of subjects in this that an attempt is made to tax fish-traps and gill-nets while seines are not taxed. Thereby imposing a burden on those fishing by means of traps and gill-nets, not imposed upon those fishing by means of seines, and the act is for that reason void to the extent that fish-traps are sought to be taxed.

V.

That the act referred to in the complaint is void for the reason that it is an attempt to lay and collect a tax without any reference to the value of the thing taxed, contrary to the provisions of the Organic Act in that regard.

VI.

That the tax imposed by the act, referred to [36] in the complaint, is in fact a specific tax on property, and as such is levied without any reference to the value of the property sought to be taxed, to wit, the fish-traps, contrary to the provisions of the Organic Act in that regard.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

SECOND ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in failing and refusing at the request of the plaintiff in error, The Alaska Pacific Fisheries, to conclude as a matter of law from the facts found and to adopt as its conclusion of law conclusion of law No. 1 as requested by the defendant, which is in words and figures as follows:

"CONCLUSION OF LAW NO. 1, AS REQUESTED BY DEFENDANT.

That the act of the territorial legislature of the Territory of Alaska entitled, 'An act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska, and for other purposes, and to amend an act entitled, "An act to establish a system of taxation, create revenue and provide for the collection thereof for the Territory of Alaska and for other purposes, approved May 1, 1913, and declaring an emergency,"' which said act was approved May 29, 1915, and forms the basis of this action is inoperative, invalid and void, as far as it relates to the facts in this case."

THIRD ERROR ASSIGNED.

That the District Court, for the Territory of Alaska, Division Number One, erred in failing and refusing at the request of the plaintiff in error, the Alaska Pacific Fisheries, to conclude as a matter of law from the facts [37] found and to adopt as its conclusion of law conclusion of Law No. 2 as requested by the defendant, which is in words and figures as follows:

"CONCLUSION OF LAW NO. 2, AS REQUESTED BY DEFENDANT.

That the defendant is not indebted to the plaintiff in any sum whatsoever, and that the complaint should be dismissed and the plaintiff recover nothing by reason thereof."

FOURTH ERROR ASSIGNED.

That the District Court, for the Territory of Alaska, Division Number One, erred in failing and refusing at the request of the plaintiff in error, The Alaska Pacific Fisheres, to conclude as a matter of law from the facts found and to adopt as its conclusion of law conclusion of law No. 3, as requested by the defendant, which is in words and figures as follows:

"CONCLUSION OF LAW NO. 3, AS REQUESTED BY DEFENDANT.

That the defendant should have judgment against the plaintiff for its costs and disbursements in this behalf incurred."

FIFTH ERROR ASSIGNED.

That the District Court, for the Territory of Alaska, Division Number One, erred in adopting as its conclusion of law and in concluding from the facts stipulated and found, as follows:

"And from the foregoing facts and stipulation the Court concludes as a matter of law that the plaintiff is entitled to judgment for the sum of $1,963 and costs." **[38]**

SIXTH ERROR ASSIGNED.

That the District Court, for the Territory of Alaska, Division Number One, erred in rendering judgment herein for the plaintiff in the sum specified or in any sum whatsoever.

HELLENTHAL & HELLENTHAL,
Attorneys for Alaska Pacific Fisheries.

Due service by copy of the foregoing admitted this —— day of December, 1915.

————————,

Chief Counsel for Territory of Alaska.

Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk. By ————, Deputy.

[Endorsed]: Original No. 1325–A. In the District Court for the Territory of Alaska, Division No. 1. Territory of Alaska, Plaintiff vs. Alaska Pacific Fisheries, a corporation, Defendant. Assignment of Errors. Hellenthal & Hellenthal, Attorneys for Alaska Pacific Fisheries. Office: Juneau, Alaska.

[39]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1325–A.

TERRITORY OF ALASKA, Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

Case No. 1325–A.

ALASKA PACIFIC FISHERIES, a Corporation, Plaintiff in Error,

vs.

TERRITORY OF ALASKA, Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS that We, the Alaska Pacific Fisheries, a corporation, as principal, and B. M. Behrends, as surety, are held and firmly bound unto the above-named Territory of Alaska, in the just and full sum of two thousand five hundred ($2,500) dollars to be paid to the said Territory of Alaska, its attorneys or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 9th day of December, A. D. 1915.

WHEREAS, lately in the District Court for the Territory of Alaska, Division Number One, in an action therein pending between the Territory of Alaska, as plaintiff, and the Alaska Pacific Fisheries as defendant, a judgment was **[40]** rendered against the said Alaska Pacific Fisheries for the sum of $1,963 and costs, and the said Alaska Pacific Fisheries having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid action and the citation directed to the said Territory of Alaska, citing and admonishing it to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty days from the date of approval of this bond,

Now the condition of the above obligation is such that if the said Alaska Pacific Fisheries shall prose-

cute said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

ALASKA PACIFIC FISHERIES.
By J. A. HELLENTHAL,
Its Attorneys, Principal.
B. M. BEHRENDS,
Surety.

Signed, sealed and delivered in the presence of:
M. CASEY.
GUY McNAUGHTON.

The above and foregoing supersedeas and cost bond is hereby duly approved, not only as to form, but also as to the surety thereon, this 9th day of December, 1915.

ROBERT W. JENNINGS,
Judge of the District Court for the Territory of Alaska, Division Number One.

Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk. By ———— Deputy.

[Endorsed]: Original No. ——. In the District Court for the Territory of Alaska, Division No. 1. Territory of Alaska, Plaintiff vs. Alaska Pacific Fisheries, a Corporation, Defendant. Bond on Writ of Error. Hellenthal & Hellenthal, Attorneys for ————. Office: Juneau, Alaska. **[41]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

United States Circuit Court of Appeals for the Ninth Circuit Holden at San Francisco.

Case No. 1325–A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error.

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable ROBERT W. JENNINGS, Judge of the District Court for the Territory of Alaska, Division Number One, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in said District Court, Division Number One thereof, before you, between the territory of Alaska, as plaintiff, and the Alaska Pacific Fisheries, a corporation, as defendant, a manifest error hath lhappened to the great prejudice and damage of the said Alaska Pacific Fisheries as set forth and appears by the petition herein,

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send

the records and proceedings aforesaid with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, **[42]** in the city of San Francisco, in the State of California, together with this writ, so as to have the same at said place and said circuit on or before thirty days from the date hereof that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 9th day of December, A. D. 1915.

Attest my hand and the seal of the District Court for the Territory of Alaska, Division Number One, at the clerk's office at Juneau on the day and year last above written.

[Seal] J. W. BELL,

Clerk of the District Court for the Territory of Alaska, Division No. 1.

Allowed this 9th day of December, A. D. 1915.

ROBERT W. JENNINGS,

Judge.

Due service of the within and foregoing writ of error is acknowledged this 9th day of December, A. D., 1915.

J. H. COBB,

Chief Counsel for the Territory of Alaska. **[43]**

[Endorsed]: Original. No. 1325–A. In the District Court, for the Territory of Alaska, Division

No. 1. The Territory of Alaska, Plaintiff, vs. Alaska Fisheries, a Corporation, Defendant. Writ of Error. Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk. By ———— Deputy. **[44]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1325–A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

United States Circuit Court of Appeals for the Ninth Circuit Holden at San Francisco.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

No. 1325–A.

Citation on Writ of Error.

The President of the United States to the Territory of Alaska, the Above-named Plaintiff, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within thirty

(30) days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, wherein the Alaska Pacific Fisheries, a corporation, is the plaintiff in error and you, the said Territory of Alaska, are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should [45] be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 9th day of December, A. D., 1915, and of the Independence of the United States the 139th.

ROBERT W. JENNINGS,
Judge.

Due and personal service of the foregoing citation is hereby admitted on behalf of the Territory of Alaska, defendant in error, this 9th day of December A. D., 1915.

J. H. COBB,
Attorney for said Defendant in Error. [46]

[Endorsed]: Original. No. 1325–A. In the District Court for the Territory of Alaska, Division No. 1. The Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Citation on Writ of Error. Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk. By ————, Deputy. [47]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1325–A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,

Defendant.

No. 1326–A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,

Defendant.

Memorandum Opinion on Demurrer. [48]

By act approved April 29, 1915, the legislature of Alaska provided as follows:

"Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska, shall apply for and obtain a license and pay for said license, for the respective lines of business as follows:

. . . . . .

8. Fish-traps, fixed or floating, $100 per annum. So-called dummy traps included."

. . . . . .

It also provided in Section 2 that

"Every person, firm or corporation desiring

to engage in any of the lines of business specified in section 1, shall first apply to and obtain from the territorial treasurer a license. If the tax for the license applied for is a fixed sum, the amount of such license tax shall accompany the application."

Said section 2 further provided for the bringing of a suit, either civil or criminal, to collect the license, and section 4 of the said act provided:

"Special remedies provided by this act . . . shall not be deemed exclusive, and any appropriate remedy, either civil or criminal or both, may be invoked by the territory in the collection of all taxes; and in civil actions the same penalties may be collected as are herein provided in criminal actions."

Under the provisions of this act of the legislature, the Territory of Alaska brought suit against the defendant, alleging in the complaint—

"That during the month of June, 1915, and continuously up to the present time the defendant was engaged in and prosecuting and attempting to prosecute the business of fishing by means of fish-traps situate in the waters of Alaska, and that it has failed, neglected and refused to pay the license tax, or any part thereof, provided for by said act of the legislature. Wherefore the territory asks for judgment for the amount of the license tax due."

To this a demurrer has been interposed, on the ground that the said complaint does not state facts sufficient to constitute a cause of action; and in sup-

port of the demurrer the point is raised that the legislature had no power to impose such a tax, for the reasons— [49]

1. Congress has reserved to itself the exclusive control of the fish and game in Alaska.

2. The said tax is in violation of section 9 of the Organic Act of the Territory (Act of June 26, 1906, aforesaid), which provides:

> "All taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof."

As to the first point raised in support of the demurrer, to wit: "Congress has reserved to itself the exclusive control of the fish and game of Alaska"; it is urged that by the act approved June 26, 1906, (34 Stat. L. 478) Congress provided:

> "That every person, company or corporation carrying on the business of canning, curing or preserving fish, or manufacturing fish products within the Territory known as Alaska . . . shall, in lieu of all other license fees and taxes therefor and thereon, pay a license tax on their said business and output as follows:
>
> Canned Salmon, 4¢ per case;
>
> Pickled Salmon, 10¢ per barrel;
>
> Salt Salmon in bulk, 5¢ per 100 pounds;
>
> Fish Oil, 10¢ per barrel;
>
> Fertilizer, 20¢ per ton;

and that the Organic Act of the territory, passed six years after the act of 1906, and which provides:

> "That the power of the legislature should not extend to the fish laws . . . or to the laws

of the United States providing for taxes on business and trade; provided, further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses" (C. L. 1913; Sec. 421.)

should be taken to mean that the legislature is not prohibited from imposing other and additional licenses or taxes "on other kinds of industries and on other kinds of business or trade not covered by the act of 1906."

The reasoning advanced why the Court should so hold is not convincing on the contrary, as the Organic Act is the latest expression of the legislative will on the subject, it would seem that it must be taken as repealing that part of the former act which is in conflict therewith, to wit: "shall in lieu of all other license fees and taxes." For the Court to hold that the [50] later act does not repeal the former act to the extent indicated, it would be compelled to read into the later act some words which are not there, to wit: "On other kinds of industries and on other kinds of business or trade not covered by the act of 1906." This would not be justified by any canon of construction. The very position of the proviso in the statute shows what Congress had in mind, to wit, that in imposing other and additional licenses or taxes the legislature should not be fettered by anything contained in the act of 1906. It is not apparent that there is any need of construction, for the language is plain and unambiguous. A reference to the debates in Congress when the bill was before it would clear up any ambiguity if, indeed, any such existed.

The bill came up for argument on Wednesday, the 24th of April, 1912. In its original form the proviso was as follows:

> "That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States";

and nothing was there said about the game or the fish. Whereupon the following occurred:

Mr. WILLIS.—Mr. Chairman, I offer the following amendment, which I send to the desk and ask to have read.

The Clerk read as follows:

Line 9, page 23, after the word "States," insert the words "or to the game laws of the United States applicable to Alaska."

Mr. MANN.—Why not make it game and fish laws?

Mr. WICKERSHAM.—Mr. Chairman, I think the fish laws ought to be left alone.

Mr. MANN.—Why not make it game and fish laws, so that they cannot repeal the fish laws? They can pass new fish laws.

Mr. WILLIS.—Mr. Chairman, I will accept that amendment, and ask unanimous consent that it be so modified and reported as modified.

The CHAIRMAN. — Without objection, the amendment will be so modified, and the clerk will report the amendment as modified.

The Clerk read as follows:

Line 9, page 23, after the word "States," insert

the words "or to the game and fish laws of the United States applicable to Alaska."

Mr. WICKERSHAM.—Mr. Chairman, I do not think that the word "fish" ought to be in there. I think the fisheries in Alaska need protection. They belong to the people of the State or to the Territory, and they do not belong to the Government of the United States. They are not now being protected. They are not now being conserved, and if this legislature will do something toward conserving, and protecting the fish it ought to be allowed [51] to do it. This simply bars the legislature from protecting the fisheries in that Territory, and it ought not to be in the bill.

Mr. MANN.—The gentleman will notice this provision does not apply to passing laws, but only to the repealing of laws.

Mr. WILLIS.—It seems to me the observation of the gentleman from Illinois answers the objection of the gentleman from Alaska. It simply provides, if it shall be adopted, that the legislature of the Territory of Alaska shall not have the power to alter, amend or repeal the United States fish or game laws now in force in the Territory. It does not take away from the legislature the power to pass additional laws of that character. It seems to me that meets the objection.

Mr. WICKERSHAM.—I think they ought to be allowed to amend them.

Mr. WILLIS.—We have a Federal fish law in Alaska. The gentleman is not objecting to that.

Mr. WICKERSHAM.—No.

Mr. WILLIS.—That is all this amendment pro-

vides—that the legislature shall not have the power to amend the present fish or game laws.

Mr. WICKERSHAM.—What does that mean?

Mr. WILLIS.—It means that the present law shall stand.

Mr. FLOOD of Virginia.—Suppose Congress passes a law revising and extending the fish laws there?

Mr. WILLIS.—Well, undoubtedly that will be the paramount law of Alaska.

Mr. FLOOD of Virginia.—What will be the effect of the gentleman's amendment?

Mr. WILLIS.—The effect of this amendment will be, as I understand it, simply to take away from the legislature of Alaska the power to amend the fish or game laws now in effect in Alaska.

Mr. FLOOD of Virginia.—It would not have the effect to take away from the legislature of Alaska the power to amend the fish laws we hereafter pass?

Mr. WILLIS.—No; I do not think it would, as I have worded it, although I did not have that in mind when I drafted the amendment.

Mr. MANN.—They would not have that power?

Mr. WILLIS.—They would not have that power now.

Mr. FLOOD of Virginia.—The gentleman is aware of the fact there is a proposition to revise the fish laws?

Mr. WILLIS.—Yes; I think the bill is a good one and ought to pass.

Mr. FLOOD of Virginia.—And will in all probability become the law.

Mr. WILLIS.—It seems to me this meets the objection that has been raised in a perfectly fair manner, and I think it is a fair objection, but I do not believe the legislature ought to repeal the present game or fish laws.

Mr. MANN.—We have endeavored to provide in a way for the conservation of the fisheries and game up there. We ought not to permit those laws to be repealed, but if they want to make them more stringent, and probably do, they ought to have that right.

Mr. FLOOD of Virginia.—I do not think the amendment means anything, but if it will please anybody to put it in, why, let it go.

Mr. WICKERSHAM.—I shall withdraw my objection.

The question was taken, and the amendment was agreed to.

(Vol. 48, Part 6, page 5288, Congressional Record, 62d Congress, Second Session.)

This, however, did not seem to be specific enough for the Senate for when the bill reached that body it was amended by having added to it this provision: [52]

> "Provided further that this provision shall not operate to prevent the legislature from imposing other and additional taxes and licenses."

The House refused to agree to this and to several other amendments, and the committee on conference of the House reported, recommending that the House recede from its disagreement to this Senate amendment. The House did recede from said disagreement, and the Senate proviso was added to the bill.

This occurred on August 20, 1912, and the record of it is found in said Congressional Record at page ——.

Thus it will be seen—

1. That there is on the face of the bill no expression of any such purpose as is contended for.

2. That no such purpose as is contended for was in the minds of the legislators when the bill passed, but on the contrary what was in their minds was that the legislature should have the power to levy additional taxes on the fish and the game business and on other businesses.

As to the second point raised in support of the demurrer, to wit: "The said tax is in violation of section 9 of the Organic Act of the Territory";

A reference to the legislation and to one Supreme Court decision on the subject of the taxation of the fisheries business in Alaska may throw some light on the subject.

By the criminal code of Alaska, adopted March 3, 1899, (C. L. 1913, Sec. 2569) Congress provided:

> "That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain a license so to do from a District Court or a subdivision thereof in said District, and pay for said license for the respective lines of business and trade as follows, to wit:
>
> . . . . . .

Fisheries: Salmon Canneries, 4¢ per case;
Salmon Salteries, 10¢ per barrel;
Fish Oil Works, 10¢ per barrel;
Fertilizer Works, 20¢ per ton."

The point was raised that this act was in violation of section 8, article 1 of the Constitution of the United States, which reads: **[53]**

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States;"

and that said act, insomuch as it directed the money to be paid into the treasury of the United States could not be sustained. The point was passed upon in the case of Binns V. United States, (194 U. S. 486, decided May 31, 1904), and Justice Brewer, at page 491 says:

> "We shall assume that the purpose of the license fees required by section 460 is the collection of revenue, and that the license fees are excises within the constitutional sense of the terms. Nevertheless we are of opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the administration of local government in Alaska.
>
> It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are ac-

customed to that generally adopted for the territories, of a *quasi* State Government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a territory or transfer the power of such legislation to a legislature elected by the citizens of the territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes."

And later on in the decision the learned Justice quotes the following from volume 32 Congressional Record, part 3, page 2235, to wit:

" 'The committee on territories have thoroughly investigated the conditions of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the Territory of Alaska . . . They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the committee on territories, after consultation with prominent citizens of the Territory of Alaska, including the Governor and [54] several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.'

While, of course, it would have simplified the matter and removed all doubt if the statute had provided that those taxes be paid directly to some local treasurer and by him disbursed in payment of territorial expenses, yet it seems to us it would be sacrificing substance to form to hold that the method pursued when the intent of Congress is obvious, is sufficient to invalidate the taxes.

In order to avoid any misapprehension we

> may add that this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the territorial government."

Thus it will be seen that the license was declared to be a tax and was sustained as not being in contravention of the said Articles of the Constitution, on account of the fact that the money, although to be paid into the treasury of the United States, was to be used for the support of the territory—in other words, that it was a tax imposed on businesses in Alaska by Congress, the then legislative body for Alaska, for local purposes.

Then came the acts of Congress of March 30, 1906, and of March 24, 1912, *supra.*

Such being the state of Federal legislation on the subject of taxing the fishing industry in Alaska, the legislature of Alaska passed the act whose validity is here assailed.

We have seen by the Binns case that Congress when imposing a license tax system on businesses in Alaska, was not fettered by the constitutional prohibition as to uniformity. It must be conceded that Congress had plenary power over the territory—that is, that it could legislate on all rightful subjects of legislation not prohibited by the national constitution. This power it had, not so much from its constitutional power to make rules and regulations for

the government of the territory, as from its inherent power arising from the ownership of the *res.* Having this power, Congress certainly had the power to confer it upon the legislature. It is true that the powers of that legislature are limited by the act defining those powers and that in this respect a territorial legislature differs from State legislatures; that [55] is to say, the Organic Act of a territory if a grant of specific powers and not a reservation of specific powers.

Congress, when implanting this new jurisdiction in Alaska, expressly provided that the power of the Alaska legislature

> "Shall extend to all rightful subjects of legislation not inconsistent with the laws of the United States, but it shall not, etc."

Then follow exceptions too numerous to mention,—more than have obtained in the case of any other territory,—well nigh emasculating the original grant, and causing it to "speak the word of promise to the ear and break it to the hope." However, of its pristine vigor there is left enough to justify the imposition of license taxes and property taxes. Such power finds its warrant in the principle that unless a power is forbidden to our legislature the latter possesses the power—"provided it be a rightful subject of legislation." That is to say, Congress, ordaining for this territory an Organic Act, does a thing for the territory which in its nature but not in its extent, is similar, analogous, to what the people of a State do when they adopt a constitution for the State.

"The legislative power to be exercised by the territorial legislature is the legislative power of the territory, not that of the United States. Both states and territories, in a certain sense, derive their existence from the legislation of Congress, but the jurisdiction and authority exercised, either by a state or territory, is that of a state or territory, and not that of Congress. Territorial statutes have a distinct and well-defined character of their own. The people of a territory, when authorized to form a territorial government, are vested with a qualified sovereignty. Congress may limit their powers, and may annul their enactments, but, subject to these limitations, the territory is a government. Its laws, unless set aside by Congress or the courts, are the laws of the territory; they are not laws of the United States, within the ordinary meaning of those terms; certainly not in the sense that the acts of Congress, approved by the president, are laws of the United States."
(16 Fed. 715.)

This being true, the inquiries are these:

(a.) When the legislature imposed this license tax, was it exercising power over a rightful subject of legislation? If it was not so exercising power, the enactment must fall; if, however, it was so exercising power, the enactment must stand, *unless* it violates some other provision of the constitution, (Organic Act.) **[56]**

That the power to raise revenue by levying a license tax on business pursuits is " a rightful subject of legislation" will hardly be denied.

25 Cyc. p. 599, Sec. 3, and cases cited in Note 16.

(b) Pursuing the argument, then: Such power, being a rightful subject of legislation, exists in the legislature of this Territory unless there is some provision in the Organic Act which negatives the power. If there is any such provision, where is it to be found?

Counsel for defendant affects to find it in that provision of the Organic Act which declares that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the value thereof. No taxes shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of the property therein in any one year."

If this uniformity requirement applied to anything except direct property taxes the argument might prevail—but that in fact it does apply exclusively to direct property taxes and to nothing else has been decided so often as to be beyond caval.

25 Cyc. p. 605–6, and cases cited.

> "The constitutions of many of the states contain the requirement that taxation shall be equal and uniform, that all property in the state shall be taxed in proportion to its value, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or that the legislature shall provide for an equal and uniform rate of assessment and taxation; and in the face of such provisions a tax law which violates the

prescribed rule of equality and uniformity is invalid, although there is sufficient difference in the wording of the different provisions to account for some lack of uniformity in the decisions as to what constitutes a violation of their requirements. The requirement does not apply to every species of taxation, and does not restrict the legislature to the levying of taxes upon property alone. The restriction relates only to the rate or amount of taxation and its incidence upon taxable persons and property, and does not limit the legislature in regulating the mode of levying and collecting the taxes imposed, and it also relates only to property within the state, and neither the statutes of another state nor the action of its taxing officers can affect the question. In the absence of such a constitutional requirement it is not essential to the validity of taxation that it shall be equal and uniform, and in such a case a tax law cannot be declared unconstitutional merely because it operates unequally, unjustly, or oppressively. **[57]**

The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes, and not to such as are of an extraordinary and exceptional kind, or to local assessments for improvements levied upon property specially benefited thereby, or to other burdens, charges, or impositions which are not properly speaking taxes; and further,

such a constitutional provision is to be restricted to taxes on property, as distinguished from such as are levied on occupations, business, or franchises, and on inheritances and successions, and as distinguished also from exactions imposed in the exercise of the police power rather than that of taxation.

The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that if those following the same calling are divided into classes for the purposes of taxation, the basis of classification shall be reasonable and founded on a real distinction, and not merely arbitrary or capricious. To this extent also, and no further, the principle applies to license fees or taxes imposed under the police power or for the better regulation of occupations supposed to have an important public aspect."

(37 Cyc. p. 729–33.)

It is argued that the legislature has only such powers of taxation as is conferred by section 9 of the Organic Act—but this is a mistake. It is true that that section expresses the limit of its powers as to direct property taxation, but it is elsewhere granted the express power to raise revenue by license taxes (C. L. 1913, S. 410), and as a matter of

fact that is the only method of taxation which the Legislature has adopted.

It is said that the system of taxation adopted is the exercise of special and not general legislation—This position is untenable. See Codlin v. Kohlhausen, 58 P. R. 499.

It is said that there has been no assessment, but

> "The cardinal rule in taxation that whenever a tax is to be fixed by assessment the due assessment must precede any valid claim of such tax does not apply to license taxes, except where the statute expressly so provides, or where the tax is according to value, or depends upon the ascertainment of person or value by some designated official."
>
> (25 Cyc. p. 628.)

It is said that the fact that a lien on the property is reserved for the taxes shows that this is a property tax, but

> "In order to complish the certain collection of license taxes, the statute may declare that such taxes shall be a lien on the property assessed and entitled to be paid in preference to all mortgages and encumbrances."
>
> (25 Cyc. p. 628.) **[58]**

It is said that there is no such business or line of business as fish-traps and that that fact, together with the fact that dummy traps are included, is proof positive that this is a property tax pure and simple—a tax on the *res* and not on the business. A dummy trap is a sham trap not used for fishing but designed simply to squat on and hold a trap lo-

cation. None of the traps in question are dummy traps. The complaint seeks to recover the license tax from "fishing" traps, and if the tax on them is valid it would not matter that the tax on dummy traps is invalid.

It is true there is no such business or line of business as fish-traps, but this is a mere "inaptitude of expression." The meaning is plain when the language is read in connection with that knowledge of the fishing business (one of the main enterprises of Alaska) common to all our people and of which the legislature will not be considered ignorant and of which the Court will take judicial notice. The legislature meant that whoever conducts the business of fishing by means of fish-traps must pay the license required by law. Although taxation statutes are to be strictly construed against the taxing power, yet they are to be construed to mean something, if possible, and are not to have their vitality frittered away by technical refinements.

Cyc.

The demurrer in each case will be overruled.

ROBERT W. JENNINGS,
Judge. **[59]**

Filed in the District Court, District of Alaska, First Division. Aug. 11, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: No 1325–A. In the United States District Court for the District of Alaska. Division No. One. The Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Memorandum Opinion. **[60]**

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1325–A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,

Defendant.

No. 1326–A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,

Defendant.

Opinion.

In its opinion rendered on the occasion of overruling the demurrer to the complaint in this cause, the Court decided in favor of plaintiff all the questions now presented (at the trial hereof) except

1. The question as to whether or not the term of the legislature had expired when chapter 76, Laws of the Alaska legislature of 1915 was passed;

2. The question as to whether or not the catching of fish to be canned and then sold is "engaging in the fishing business";

and those two questions will be now considered.

(1) The Organic Act (sec. 413 Compiled Laws of Alaska, 1913) provides:

"That the legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but **[61]** the said legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by proclamation of the Governor."

By the stipulation of facts it appears that the legislature convened on the 1st day of March, 1915, at 12 o'clock noon. By the Organic Act it is not to continue in session longer than 60 days in any two years. By the stipulation it also appears that the act in question "was finally passed by both Houses of the legislature and approved by the Governor and was enrolled and filed in the office of the Secretary of State for the Territory as it now appears in the printed volume of the Session Laws of Alaska for 1915—Chapter 76."

Conceding, for the sake of argument only, that that clause of the stipulation does not settle the matter and preclude any further inquiry, this question arises: At what time did the 60 days mentioned in the Organic Act expire?

There seems to be a conflict of authorities as to whether or not Sundays and holidays are to be included in counting the sixty days. The cases of Cheyney vs. Smith, 23 P. R. 680 (Ariz.), of Moog vs. Randolph, 77 Ala. 608, and some others, hold to the negative: In the dissenting opinion in the Arizona case some authorities holding to the affirmative are

collected; and in an opinion dated March 16, 1889, given by Attorney General Miller to the Secretary of the Interior that official distinctly held that Sundays and holidays are to be counted as days of the session; (Vol. 19, p. 259, Opinions of Attorneys General); but however, this may be, the Alaska legislature of 1915, convened at noon on the 1st day of March, 1915, and adjourned *sine die* between 3 and 4 o'clock A. M. (sun time), on April 30, 1915, (see stipulation); so that even counting Sundays and holidays, it did not continue in session longer than 60 days; for the full **[62]** period of sixty days did not expire until noon of the 60th day—that is noon of April 30, 1915.

White vs. Hinton, 17 L. R. A. 66 (Wyo.).

As to the second question: defendant contends that the catching of the fish is a mere adjunct of the canning business, without which the latter cannot or does not exist; That it is not engaged in the business of fishing but in the business of canning, and that by act of Congress approved June 26, 1906, (34 Stats. at Large, 478) it was provided that the tax therein prescribed for carrying on the business of canning shall be "in lieu of all other license fees and taxes therefor and thereon." The argument, if carried out logically, would result in the proposition that Congress itself having said that the license tax provided in the act shall be in lieu of all other license fees and taxes, could not by a later law impose for the future a license larger in amount than that which was imposed by the former act, or tax the different branches or instrumentalities

of the canning business. Such a proposition is untenable, for the power of Congress is plenary in the matter. What Congress could do in this matter the territorial legislature can do, for the power of the latter extends to "all rightful subjects of legislation" not forbiddden by the Organic Act (Organic Act, Sec. 416), and "except as herein provided, all laws uow in force in Alaska shall continue in full force and effect until altered, amended or repealed by Congress or by the legislature" (Organic Act, C. L. 410); and "Provided further: That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses." As Congress, then, could provide that all persons catching fish for canning shall pay a certain license tax, and all persons canning the captured fish shall pay **[63]** and additional license tax, so the legislature also may provide the same thing. Now, that is just what the legislature has done by the act in question: It has provided that all persons in the business or line of business of catching fish by means of fish-traps (whether or not they catch the fish for canning purposes) shall pay $100, and all persons canning the captured fish (whether the fish are caught in traps or nets or seines) shall pay 4 cents per case, etc.—in other words, a license tax for catching and a license tax for canning.

Findings and judgment for plaintiff as per stipulation.

_____,

Judge.

Filed in the District Court, District of Alaska, First Division. Nov. 30, 1915. J. W. Bell, Clerk.

Certificate of Clerk U. S. District Court to Transcript of Record.

In the District Court for the District of Alaska, Division Number One, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached sixty-four pages of typewritten matter, numbered from 1 to 64, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of attorneys for defendant and plaintiff in error, on file in my office and made a part hereof, in Cause No. 1325-A, wherein the Territory of Alaska is plaintiff and defendant in error and Alaska Pacific Fisheries, a corporation, is defendant and plaintiff in error.

I further certify, that the said record is by virtue of the writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Twenty-nine and 85/100 Dollars ($29.85) has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the above-entitled court this 10th day of December, 1915.

[Seal] J. W. BELL,
Clerk of the District Court, for the District of Alaska, Division No. 1.

[Endorsed]: No. 2709. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Pacific Fisheries, a Corporation, Plaintiff in Error, vs. The Territory of Alaska, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed December 18, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed Jan. 26, 1916. F. D. Monckton, Clerk.

No. 2709

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the seventh day of March, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

Nos. 2709 and 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Order of Submission.

ORDERED, above-entitled causes argued by Mr. J. A. Hellenthal, counsel for the plaintiff in error, and by Mr. J. H. Cobb, counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the fifth day of September, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, Erskine M. Ross and William H. Hunt, Circuit Judges, before whom the cases were heard, ORDERED, that the typewritten opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed, and recorded in the Minutes of this court, in each of the causes in accordance with the opinion filed therein: * * * Alaska Pacific Fisheries, a Corporation, Plaintiff in Error, vs. The Territory of Alaska, Defendant in Error, No. 2709. * * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Upon Writ of Error to the United States District Court of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL, of Juneau, Alaska, for Plaintiff in Error.

JOHN H. COBB, Chief Counsel for the Territory of Alaska, of Juneau, Alaska, for Defendant in Error.

Before GILBERT, ROSS and HUNT, Circuit Judges.

HUNT, Circuit Judge:

In an Act of Congress "for the protection and regulation of the fisheries of Alaska," approved the 26th of June, 1906, it was provided, among other things, that every person or corporation carrying on the business of canning, curing or preserving fish or manufacturing fish products within Alaska shall, "in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows: Canned salmon, four cents per

case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds. * * * " The payment and collection of such license tax was required to be in accordance with the provisions of the Act of March 3, 1899, which was an Act defining and punishing crimes in Alaska.

On August 24, 1912, Congress passed the Organic Act for Alaska providing for a Territorial Legislature. In this Act, which conferred legislative power upon the Territory, it was provided that the Constitution of the United States and all the laws not locally inapplicable were made effective; and all laws then in force were to be continued in force until altered, amended or repealed by Congress or by the legislature: provided, that the authority granted to the legislature to amend, modify and repeal laws in force in Alaska should not extend to certain laws, including the game, fish and fur-seal laws applicable to Alaska, "or to the laws of the United States providing for taxes on business and trade," etc.; and it was also provided, "That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses." Section 6 of the Organic Act provided that the legislature should convene at the capital, Juneau, on the first Monday in March, 1913, and on the first Monday in March every two years thereafter, but should not continue in session longer than sixty days in any two years, unless, etc. By Section 9 of the Act the legislative power of the Territory shall extend to "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States,"

etc., "Provided, * * * all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof."

By an Act of the legislature of the Territory, approved April 29, 1915, entitled, "An Act to establish a system of taxation, create revenue and provide for collection thereof, for the Territory of Alaska, and for other purposes; and to amend 'An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes,' approved May 1, 1913," it was provided:

> "Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska shall apply for and obtain a license and pay for said license for the respective lines of business as follows: * * *
>
> 8th. Fish-traps: Fixed or floating, one hundred dollars per annum. So called dummy traps included."

The plaintiff in error, defendant below, was sued by the Territory for moneys alleged to be due for prosecuting and attempting to prosecute the business of fishing by means of fish-traps situated in the waters of Alaska. After a demurrer had been overruled, defendant answered, setting up, in effect: (1) That the Act of the Alaska legislature just cited was void under the Act of Congress creating the Alaska

legislature, and under the Constitution of the United States; (2) that the Act was void because the tax attempted to be laid was not uniform upon the same class of subjects in that it taxes fish-traps and gill-nets, while seines are not taxed; (3) that the Act referred to is void in that it is an attempt to levy a tax without reference to the value of the thing taxed; (4) that the tax imposed by the Act cited is, in fact, a specific tax on property, and as such is levied without reference to the value of the property sought to be taxed, and is, therefore, contrary to the provisions of the Organic Act; (5) that the Act referred to was void because the term of the legislature had expired when the law was passed; and (6) that the defendants were not engaged in the fishing business within the meaning of the law.

The case was tried upon agreed facts substantially as follows: That the defendant owned nineteen fish-traps within the waters of southern Alaska, and that they were all operated during the fishing season of 1915; that none of the fish taken in any trap operated by defendant were sold prior to being canned, but all fish so caught were used by defendant in operating its canning plants; that some of the canneries in Alaska are so situated that they are obliged to supply the fish canned by resorting to the use of fish-traps, while others are situated so that the fish can be supplied in no practical manner except by the use of gill-nets, and others are so situated that fish cannot be supplied except by the use of seines, and that defendant cannot practically use seines and is obliged to resort to fish-traps; that defendant has complied

with all the provisions of Chapter 3, Title VII, of the Compiled Laws of Alaska, relating to fish and fisheries, including the provisions of Sections 259 to 275a, inclusive, and has paid the license tax provided for by said sections, but that defendant has not paid the tax sued for in this action for 1915, or any part thereof; that the session of the legislature which passed the Act which forms the basis of this action, namely, Chapter 76, Session Laws of Alaska, 1915, convened March 1, 1915, at 12 o'clock noon; that on the 29th of April, 1915, the legislature adjourned *sine die* at 12 o'clock midnight according to the official timepieces of the said legislature; that is to say, the clocks hanging in the halls of the two houses were stopped or turned back by the sergeant-at-arms just prior to the hour of 12 o'clock midnight of April 29, 1915, and thereafter, between the hours of 3 and 4 o'clock A. M., sun time, of April 30, 1915, while the clocks in the halls of the legislature still indicated a time prior to midnight, being stopped or turned back as aforesaid, the Act, Chapter 76 of the Session Laws of Alaska, 1915, was finally passed by both houses of the legislature and approved by the Governor and enrolled with the Secretary for the Territory as it now appears in the printed volume of the Session Laws of Alaska, 1915, Chapter 76; that some of the traps of the defendant are worth over $10,000, while some are not worth to exceed $1,000.

The District Court ordered judgment for the Territory for $1,963. Judgment was entered accordingly, and writ of error to this court was sued out.

It is plain, we think, that our conclusions should be arrived at by assuming that the great object of the legislative act of April 29, 1915, quoted above, was to create revenue, and that in its scheme of license taxes, the legislature had in mind provision for the expense of administration of the Territory. Congress having given to Alaska a territorial form of government and having created a legislative assembly and conferred upon it legislative powers, the power in the general words used was broad enough to authorize legislation upon "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." This was the scope of the power as by first expression conferred. But at once, by the same provision which conferred the general power, there were imposed many restrictions or limitations which must be read with the general transfer of authority and which, when construed with it, in practical effect greatly limit the exercise of the power. The specific restrictions included, among other matters, legislation with respect to public lands, charters, divorces, lotteries, gambling, manufacture of liquor, subscriptions to stock of incorporated companies, and to laws creating loans and bonded indebtedness. We have mentioned these enumerated limitations because their number and importance emphasize the thought that but for them the general words whereby the conferred legislative power should extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States would have comprehended power to legislate with respect to them as included

within rightful subjects of legislation. We find also that by Section 3 of the Organic Act the power was curtailed with respect to the then existing game and fish laws of the United States applicable to Alaska by express declaration that the general authority conferred was not extended to alter, amend, modify and repeal laws in force on those subjects, or "to the laws of the United States providing for taxes on business and trade." If these restrictions stood without qualifying language, undoubtedly they would prevent legislation which would alter, amend, modify or repeal not alone the then existing fish laws, but also the laws for taxation of business in force when the Organic Act was passed; that is, August 24, 1912. Plainly such then existing laws would have continued as the only statutes which controlled. But we cannot stop at this point, for by the same section (3) of the Act wherein we read the words which saved existing fish laws and those providing for taxes on business, Congress went on to provide explicitly that the provisions of limitation should not "operate to prevent the legislature from imposing other and additional taxes or licenses." Now, when Congress provided against possible misunderstanding as to the operation of the statute, it in effect defined its intentions and by positive words removed limitations upon the grant of general legislative power under which other and additional taxes and licenses might thereafter be imposed, excepting, of course, such other special limitations as were incorporated within the Organic Act itself. Going, then, to the text of the Act to see if we find such limitations upon the

power to legislate for the future, none such appear with respect to the imposition of additional license taxes on the fishing business.

It is urged that by the legislation of Congress (Act approved June 26, 1906, 34 Stat. L. 478) there was a reservation of exclusive control of the fish of Alaska and of the right to legislate with respect thereto. It is correct that in the Act of 1906 referred to there was a provision that every person or corporation carrying on the business of canning, curing or preserving fish products within Alaska should "in lieu of all other license fees and taxes therefor and thereon, pay a license tax on their said business and output as follows," and specifying taxes to be paid and collected. The effect of this declaration was to make the license fees upon the salmon canning and manufacturing business those prescribed in that Act, and not those which had previously been fixed in the Act of June 6, 1900 (31 Stat. L. 331). This Act of June 26, 1906, with detailed care made provision whereby the catch and pack of salmon made in Alaska by the owners of private salmon hatcheries in Alaska should be exempt from all license fees and taxation of every nature at the rate of ten cases of canned salmon to every one thousand red or king salmon fry liberated, upon certain conditions. Provisions were also made declaring it to be unlawful to maintain dams, fences, and other obstructions, except for fish culture, unless placed at certain distances from shores; imposing restrictions on the use of drift nets, seines, traps, and other appliances, except for fish culture;

also for a weekly close season. The law also authorized the Secretary of Commerce & Labor to designate spawning grounds in which fishing might be limited or prohibited. The wanton waste of fish was prohibited, the use of brands was limited, and the method of catching or killing fish was regulated and provisions made for punishment for violations of the law. But when Congress, in 1912, conferred the legislative power which we have shown exists, while it expressly withheld power to alter or amend laws pertaining to fish and other certain subjects and saved certain laws then in force, it nevertheless unmistakably transferred power to the newly created legislative body to impose other and additional taxes and licenses; that is, power to impose taxes different from, and, it might be, additional to, those already in force when the Organic Act was approved. And thus by the Organic Act those general provisions for the protection of the fish which we find in the Act of 1906 were kept in force without possibility of alteration, amendment or repeal by the Territorial Legislature, and the specific license tax provided by the Act of 1906 was kept in force, but with power transferred to the legislature to impose, if it should see fit, other and additional license taxes. We cannot agree that the portion of the Act of 1906 which provides for license fees and taxes is inseparable from the other provisions of that Act. The protection and encouragement of fisheries was evidently one of the main purposes of the Act, and the creation of revenue by the imposition of a license tax on the business of

canning and manufacturing was another purpose. Those portions of the Act which have to do with the methods of carrying on fishing, and which prescribe the seasons when it may be carried on, and the waters within which it may be carried on, are preserved, but the imposition of additional license taxes to be imposed for carrying on the business was a subject of a different character and, in the judgment of Congress, might properly be entrusted to the wisdom of the newly created legislative assembly. The history of the passage of the Organic Act shows that somewhat peculiar conditions were presented with respect to providing for the fiscal needs of the Territory. No general property tax laws obtained in Alaska. Revenue would have to be raised, and naturally some scheme of license taxation of the extensive industries carried on in the Territory presented itself for adoption. The business of fishing, therefore, became a main subject for consideration by Congress of the question of future taxation, and the Congressional Records disclose that after discussion it decided not to abridge too far the transfer of power in the legislature to adopt its own scheme of levying taxes and licenses upon the fishing business, Congress reserving to itself, by Section 20 of the Organic Act, the possible exercise of the power to nullify any law passed by the Territorial Legislature. Congressional Record, Sixty-second Congress, Vol. 48, Part 6, p. 5288. Lapina v. Williams, 232 U. S. 90; Woodward v. de Graffenried, 238 U. S. 285; Kohlsaat v. Murphy, 96 U. S. 153.

Does it follow that because the license tax imposed by the Territorial Legislature is a measure creating revenue that it conflicts with that portion of Section 9 of the Organic Act providing that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof?" We take it to be indisputable that the creation of revenue by the imposition of license taxes upon carrying on of business is, in a general sense, a rightful subject of legislation. But in this matter inquiry into the general question is unnecessary, for, as already pointed out, we have express transfer of authority to the Territorial Legislature to impose license taxes. The power, therefore, being in the legislature, such taxes may be imposed without the restrictive limitations which must control in levying taxes upon property in its usual sense. Many well considered cases might be cited holding that taxes which are levied on occupations, business, or, it may be, franchises, are not brought within the principle of equality and uniformity in the sense that the legislature must make the taxation of all occupations or pursuits equal. Cooley on Taxation, Chapter VI (Third Edition). And it is well established that it is not an abuse of power if the burden of taxation is imposed equally upon all persons pursuing the same business or calling, provided, if there should be any division into classes, the basis of classification is reasonable and not merely arbitrary. Brushaber v. Union

Pacific Railroad Company, 240 U. S. 1; Flint v. Stone Tracy Company, 220 U. S. 107; Knowlton v. Moore, 178 U. S. 41; Peacock & Co. et al. v. Pratt, 121 Fed. 772. In Binns v. United States, 194 U. S. 486, we find a helpful discussion of the taxing power of Congress with respect to Alaska. A statute passed by Congress required one "prosecuting" a "line of business" within Alaska to obtain a license from the District Court in Alaska and pay for the license for the "line of business" a certain prescribed fee. The statute also provided that if one attempted to do business without having first paid the license he should be deemed guilty of a misdemeanor. Binns was prosecuted and convicted of violation of this statute. Upon review, the argument in behalf of Binns was that the statute referred to conflicted with Section 8 of Article 1 of the Constitution of the United States, which reads:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

The Supreme Court, through Justice Brewer, accepted the purpose of the Alaska law fixing license fees to be the collection of revenue, and conceded that license fees are excises within the constitutional sense of the term. But even so, the Court held that they were to be regarded as local taxes imposed for the purpose of raising funds to support

the administration of local government in Alaska, and that Congress had plenary power, except as controlled by the Constitution, to legislate for the Territory of Alaska. "It may," said that great Judge, "legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. * * * For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes. * * * In the exercise of this power, Congress, like any state legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property." We think these views are applicable and controlling in the present case, because when Congress gave to the legislature of the Territory the power to legislate upon all rightful subjects not inconsistent with the laws of the United States, it thereby exercised the right to transfer the power which it itself had, and the legislature could use it, subject, of course, to such constitutional limitations as always surrounded the Congressional power and to such further limita-

tions as Congress might see fit to throw about the power transferred.

It is argued that the legislature of Alaska did not have reference to the business of fishing with fish-traps, as "dummy traps" are classed with the others, and as dummy traps cannot be used in fishing, it is said the legislature intended to place a specific property tax on fish-traps regardless of whether the traps were used in catching fish or not. Pursuing this line of thought, plaintiff in error argues that the character of the tax from a tax on a fish-trap as property to a tax on the business of fishing by means of fish-traps merely limits the persons liable to pay a tax on fish-traps to those engaged in fishing by means of such traps, and that the tax is not free from being objectionable as a specific property tax on fish-traps rather than a tax on the business of fishing with the traps. If this construction of the territorial statute is the correct one, then it may be that the tax is not one on the business of fishing, but is upon the property used in such business. We are of opinion, however, that the broad rule of construction by which we are to ascertain the true intent of the legislature does not allow this meaning to prevail. The Act (Laws of Alaska, Second Session, 1915, p. 185) by Section 1 provides that any person "prosecuting or attempting to prosecute any of the following lines of business * * * shall apply for * * * a license for the respective lines of business as follows: * * * Fish-Traps: Fixed or floating, one hundred dollars per annum. So called dummy

traps included." The title of the Act is, "An Act to establish a system of taxation, create revenue, and provide for collection thereof," etc. Now, to prosecute a designated line of business means in ordinary acceptation to carry on the kind of business designated. Carrying on the "line of business" of fish-traps in Alaska, by common or popular understanding of persons who are at all conversant with fishing in Alaska, is understood to be fishing with fish-traps; hence the words should be given their ordinary meaning as used in connection with the business of fishing in Alaska. Unwin v. Hanson, 2 Q. B. L. R. 115; Lewis' Sutherland on Statutory Construction, § 389 (Second Edition). The inclusion of "dummy traps," which are sham traps not used for fishing, within the business of fish-traps does not affect the question. It may be that in connection with the preliminary steps of going into the business of fishing with fish-traps, dummy traps are first set to hold the desired location. But whatever may be the special use to which the dummy trap is put, the inclusion of it in the business of fishing with fish-traps in no way shows any intent to tax fish-traps as general property rather than to tax the business of fishing with traps.

We come next to the contention that the validity of the Act is affected by the fact that it was passed by the legislature after that body had been in session more than sixty days. The provision of the Organic Act, section 413, Compiled Laws of Alaska, 1913, quoted in the statement we have made, prohibits the legislature from continuing in session

longer than sixty days unless convened in extraordinary session by proclamation of the Governor. The legislature which passed the Act under consideration convened on the 1st of March, 1915, at 12 o'clock noon, and it is stipulated that the Act was finally passed by both houses of the legislature and approved by the Governor and was enrolled and filed in the office of the Secretary of State for the Territory as now appears in the printed volume of the Session Laws of 1915, Chapter 76. The legislature having convened at noon on the 1st day of March, 1915, and having adjourned *sine die* between 3 and 4 o'clock A. M., sun time, on April 30, 1915, was not in session longer than sixty days, for with Sundays and holidays included, in counting the sixty days, the sixtieth day did not expire until noon of April the 30th. White v. Hinton (Wyoming), 17 L. R. A. 66.

Plaintiff in error says that the imposition of the license tax is an unjust discrimination in favor of fisheries where the business is carried on by means of seines, in that it appears that some of the salmon fisheries operating in Alaska are so situated that the supply of fish necessary to keep the canning plant in operation can be had only by the use of fish-traps, while in some other places the operation can only be continued by using seines, and that as conditions are such that the Alaska Pacific Fisheries must use fish-traps to get fish for its canneries, to require it to pay a tax, but not to require the one who uses seines to pay, is an unjust discrimination and denies the equal protection of the laws. This

contention is answered by recognition of the fact that the power of Congress is ample in the premises, and as it had the power to provide that all persons catching fish by means of fish-traps should pay a certain license tax and all persons catching fish by seines should pay a different tax, the power transferred is not to be held invalid.

It is said that the plaintiff in error being engaged in the salmon business and having paid a tax on its output as required by the Act of Congress of June 26, 1906, should not now be required to pay a tax on the appliances used by it in connection with such business. The error of this argument rests in the assumption that the tax is a specific property tax and, therefore, assessment of it must conform to the uniformity clause of the Organic Act. We cannot agree that a license tax is to be held void for failure to comply with the requirement of uniformity upon the same class of subjects by basing the tax upon an assessment according to value. Nor do we think that the tax violates the provisions of the Constitution of the United States by any discrimination against salmon canneries or fisheries who use traps in favor of those using seines, or that it is to be held by the courts to be confiscatory in that it exacts in some cases a tax as high as ten per cent.

Without further expression of our views upon the points presented, we may add that we have given very close attention to the arguments and briefs of counsel addressed to the important questions involved.

The conclusions we have reached, that there has been no excess of power exerted by the legislature in the premises, accords, we believe, with the true intent of Congress, which, in giving to the Territory legislative power broad enough in its general scope to extend to all rightful subjects of legislation within certain limitations, gave authority to enact laws imposing the license taxes involved as additional to those theretofore imposed by Congress.

The judgment is affirmed.

[Endorsed]: Opinion. Filed Sept. 5, 1916. Frank D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the District of Alaska, Division No. 1.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Alaska, Division No. 1, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for its costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and Entered Sept. 5, 1916. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October term, A. D., 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Order Denying Petition for a Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross and William H. Hunt, Circuit Judges, before whom the case was heard, it is ORDERED that the Petition, filed October 4, 1916, on behalf of the plaintiff in error, for a rehearing of the above-entitled cause be, and hereby is denied.

At a stated term, to wit, the October Term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the thirteenth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Order Staying Issuance of Mandate Forty Days from October 13, 1916.

Upon motion made on behalf of counsel for the plaintiff in error, and good cause therefor appearing, ORDERED, issuance of Mandate under rule 32 of this court in the above-entitled cause, stayed for a period of forty (40) days from date.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2709.

ALASKA PACIFIC FISHERIES (a Corporation),
Petitioner,

vs.

TERRITORY OF ALASKA,
Respondent.

Order Staying Issuance of Mandate Fifty Days from November 15, 1916.

Upon application made upon behalf of counsel for petitioner, and good cause appearing therefor, IT IS ORDERED that issuance of Mandate under Rule 32 of this court be stayed for a period of fifty days from this date.

WM. B. GILBERT,
Presiding Judge.
WM. H. HUNT,
Judge.

Dated: November 15th, 1916.

[Endorsed]: Order Staying Issuance of Mandate. Filed Nov. 16, 1916. F. D. Monckton, Clerk.

In the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Petition for and Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

Considering itself aggrieved by the decision of the United States Circuit Court of Appeals in rendering judgment against it and in affirming the judgment of the lower court, in the above-entitled cause, the plaintiff in error hereby prays for a writ of error from the said decision and judgment to the Supreme Court of the United States, and asks that an order be made fixing the amount of a supersedeas bond.

The assignment of errors is presented herewith.

HELLENTHAL & HELLENTHAL,
J. A. HELLENTHAL,
Attorneys for Plaintiff in Error.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

It is hereby ordered that the writ of error is allowed as prayed for and that the same shall issue, and that the amount of the supersedeas bond is fixed at four thousand ($4,000.00) dollars. That when the

Alaska Pacific Fisheries, the plaintiff in error, executes said bond and the same shall have been approved, it shall act as a supersedeas.

Dated this 7th day of December, 1916.

WM. H. HUNT,
Circuit Judge.

[Endorsed]: Petition for and Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond. Filed Dec. 7, 1916. F. D. Monckton, Clerk.

In the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Assignment of Errors.

Comes now the above-named plaintiff in error and files herewith its Petition for a Writ of Error, and says that there are errors in the record of the proceedings in the above-entitled case, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding and deciding that the

act passed by the Second Territorial Legislature for the Territory of Alaska, which forms the basis of this action, and is entitled "An Act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska, and for other purposes, and to amend an act entitled, 'An Act to establish a system of taxation, create revenue and provide for the collection thereof for the Territory of Alaska and for other purposes, approved May 1, 1913, and declaring an emergency,'" was valid, especially in so far as it applied to the facts in this case. The validity of said act of the Territorial Legislature for the Territory of Alaska, especially in so far as it applies to the facts in this case, was denied and drawn in question by the plaintiff in error in the trial court in the first instance, and again when the cause was presented to the United States Circuit Court of Appeals for the Ninth Circuit, on writ of error for review, on the ground that the same, in so far as it applied to the facts in this cause, was repugnant to the Constitution of the United States and in contravention thereof; and

Further, the validity of said act was denied and drawn in question by the plaintiff in error in the trial court in the first instance and before the United States Circuit Court of Appeals for the Ninth Circuit when the cause was there presented for review on writ of error on the ground that said act was repugnant to the provisions of the Organic Act of the Territory of Alaska and in contravention thereof; and

The United States Circuit Court of Appeals for

the Ninth Circuit further erred in deciding that the plaintiff in error was engaged in the fish-trap business in the sense that it was liable for the tax prescribed on fish-traps under the act; and

Further, that the United States Circuit Court of Appeals further erred in holding that the plaintiff in error was liable for taxes under the Territorial Act notwithstanding the fact that it had paid its tax under the Act of Congress passed in 1906 relating to the Fisheries of Alaska, which provides that taxes paid thereunder shall be in lieu of all other taxes and licenses. The said errors are more particularly set forth as follows:

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding and deciding:

First: That the Territorial Legislature under the Constitution had power of discriminating against the plaintiff in error in connection with the levying and collection of taxes and the tax which did not apply to all similarly situated could be levied by the Territorial Legislature. That said United States Circuit Court of Appeals especially erred in holding that in levying and collecting taxes the Territorial Legislature might discriminate against those so situated because of natural conditions as is the case with the plaintiff in error that they are obliged to resort to the use of fish-traps, not being able to use seines, and in favor of those so situated because of natural conditions that they were in position to supply their canneries and fisheries with fish caught by the use of seines, by levying a tax on fish-traps and those employing said traps and not levying any tax on seines

or on those employing seines; that notwithstanding such discrimination against your petitioner and those similarly situated, the act of the Territorial Legislature was valid under the provisions of the Federal Constitution.

The United States Circuit Court of Appeals for the Ninth Circuit further erred in holding and deciding that although the tax in question was as to some of the fish-traps owned by the plaintiff in error a tax of ten per cent on the value thereof, it was not confiscatory, and did not deny the plaintiff in error of property without due process of law and at a sale of the plaintiff in error's property under the lien given by the tax law for the taxes, nor for it to satisfy the taxes imposed would not constitute a taking of plaintiff in error's property without compensation, and that the act of the Territorial Legislature did not violate the provisions of the Federal Constitution in this regard.

Second: That said act of the Territorial Legislature was not repugnant to the provisions of the Organic Act of the Territory of Alaska, it having been urged by the plaintiff in error that the tax sought to be collected under the provisions of that act did not comply with the requirements of section 9 of the Organic Act for the Territory, providing that

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof."

In this regard the United States Circuit Court of

Appeals erred in holding and deciding that the tax sought to be collected under this act by the Territorial Legislature was a license tax, and that being a license tax it was not necessary to its validity that it should comply with all or any of the provisions of section 9 of the Organic Act above referred to.

The United States Circuit Court of Appeals for the Ninth Circuit also erred in holding and deciding that the act in question was a license tax and not a property tax.

Third: And the Circuit Court of Appeals further erred in holding that under the facts in the case, plaintiff was engaged in the fish-trap business mentioned in the act so as to be liable for the tax imposed in connection with such business.

Fourth: Said Circuit Court of Appeals further erred in deciding that plaintiff in error was liable for taxes under the act of 1915, notwithstanding the fact that it had paid its taxes under the act of June, 1906, which provides "that every person, company or corporation carrying on the business of canning, curing or preserving fish or manufacturing fish products * * * shall, in lieu of all other license fees and taxes therefor and thereon pay license taxes on their said business and output as follows:" Here the act designates the amount to be paid, which was paid by the plaintiff in error, the plaintiff in error being engaged in the business of canning fish and using fish-traps as a mere appliance in connection with the conduct of such business.

For which errors, the plaintiff in error, the Alaska Pacific Fisheries, a corporation, prays that the said

judgment of the United States Circuit Court of Appeals for the Ninth Circuit and the order of said Court affirming the judgment of the trial court be reversed and a judgment rendered in favor of the plaintiff in error, and for costs.

HELLENTHAL & HELLENTHAL,
J. A. HELLENTHAL,
Attorneys for Alaska Pacific Fisheries.

[Endorsed]: Assignment of Errors. Filed Dec. 7, 1916. F. D. Monckton, Clerk.

In the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, the Alaska Pacific Fisheries, a corporation, as principal, and The Aetna Accident and Liability Company, a corporation, as sureties, are held and firmly bound unto the Territory of Alaska in the sum of $4,000.00, to be paid to the said Territory of Alaska, to which payment well and truly to be made we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of December, 1916.

WHEREAS the above-named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court, to reverse the judgment and order rendered in the above-entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

ALASKA PACIFIC FISHERIES.
By J. A. HELLENTHAL,
Its Attorney.

THE AETNA ACCIDENT AND LIABILITY COMPANY.
By LELAND W. CUTLER,
Resident Vice-President.

[Seal] Attest: R. A. KELLER,
Res. Asst. Secretary.

Bond approved, and to operate as a supersedeas. Dated the 8th day of December, 1916.

WM. H. HUNT,
United States Circuit Judge.

Tax Paid on Original.

THE AETNA ACCIDENT AND LIABILITY COMPANY

HARTFORD, CONNECTICUT.

Certificate of Authority of Resident Vice-President.

KNOW ALL MEN BY THESE PRESENTS, That Leland W. Cutler has been and is hereby appointed Resident Vice-President of The Aetna Accident and Liability Company, of Hartford, Connecticut, at San Francisco, Calif., and as such Resident Vice-President has full power and authority to sign and execute, on behalf of The Aetna Accident and Liability Company, any and all bonds and undertakings, and all bonds and undertakings signed by him, when sealed and attested by a Resident Assistant Secretary, shall be as valid and binding upon the Company as if said bonds and undertakings had been signed by the President and duly sealed and attested.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of The Aetna Accident and Liability Company at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident Officers, Attorneys-in-Fact and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of

the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 2. Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

IN WITNESS WHEREOF, The Aetna Accident and Liability Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 25th day of March, A. D. 1915.

THE AETNA ACCIDENT AND LIABILITY COMPANY,

[Seal] By D. N. GAGE,
Secretary.

State of Connecticut,
County of Hartford,—ss.

On this 25th day of March, A. D. 1915, before me personally came D. N. GAGE, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of The Aetna Acci-

dent and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal] JAMES F. McEVITT,
Notary Public.

My Commission Expires Jan. 31, 1916.

Tax Paid on Original.

THE AETNA ACCIDENT AND LIABILITY COMPANY
HARTFORD, CONNECTICUT.

Certificate of Authority of Resident Assistant Secretary.

KNOW ALL MEN BY THESE PRESENTS, That R. A. Keller has been and is hereby appointed Resident Assistant Secretary of The Aetna Accident and Liability Company, of Hartford, Connecticut, at San Francisco, Calif., and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the Company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Law adopted by the Board of

Directors of The Aetna Accident and Liability Company, at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident Officers, Attorneys-in-Fact and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

IN WITNESS WHEREOF, The Aetna Accident and Liability Company has caused these presents to

be signed by its Secretary, and its corporate seal to be hereto affixed, this 25th day of March, A. D. 1915.

THE AETNA ACCIDENT AND LIABILITY COMPANY.

[Seal] By D. N. GAGE,
Secretary.

State of Connecticut,
County of Hartford,—ss.

On this 25th day of March, A. D. 1915, before me personally came D. N. GAGE, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of The Aetna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal] JAMES F. McEVITT,
Notary Public.

My Commission Expires Jan. 31, 1916.

[Endorsed]: Supersedeas Bond on Writ of Error. Filed Dec. 8, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Praecipe for Certified Transcript of Record on Return to Writ of Error from Supreme Court of United States.

To the Clerk of the said Court:

Sir: Please make and furnish me with a certified transcript of the record (including the proceedings had in said Circuit Court of Appeals), and not less than thirty uncertified copies thereof, for use on Writ of Error from the Supreme Court of the United States in the above-entitled cause, the said transcript to consist of a copy of the following:

Printed transcript of record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

Order of Submission, entered March 7, 1916;

Order Directing Filing of Opinion, etc., entered Sept. 5, 1916;

Opinion, filed Sept. 5, 1916;

Judgment, filed and entered Sept. 5, 1916;

Order Denying Petition for Rehearing, entered Oct. 9, 1916;

Order Staying Issuance of Mandate, entered Oct. 13, 1916;

Order Staying Issuance of Mandate, filed Nov. 16, 1916; and

The following papers on Writ of Error returnable in Supreme Court of the United States:

Petition and Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond, filed Dec. 7, 1916;

Assignment of Errors, filed Dec. 7, 1916;

Supersedeas Bond;

Praecipe for Transcript of Record;

Writ of Error, filed Dec. 7, 1916;

Citation on Writ of Error;

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record.

Please prepare thirty or more uncertified copies of said record by printing thirty or more copies of the above-entitled proceedings that were had and papers that were filed in said cause in said Circuit Court of Appeals, and by binding one of the latter printed copies of said proceedings, etc., at the end of each of the thirty or more extra copies of the printed transcript of record on which said cause was heard in said Circuit Court of Appeals.

J. A. HELLENTHAL,
Attorney for Plaintiff in Error.

Service of the within praecipe is admitted this 8th day of January, A. D. 1917.

J. F. A. STRONG,
Governor for the Territory of Alaska, the Defendant in Error.

[Endorsed]: Praecipe for Certified Transcript of Record on Return to Writ of Error from Supreme Court, U. S. Filed Jan. 20, 1917. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Return to Writ of Error from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and thirteen (113) pages, numbered from and including 1 to and including 113, to be a true copy of the record, and of the assignment of errors, and of all proceedings had in the above-entitled case, made up pursuant to the praecipe filed by counsel for the plaintiff in error on the 20th day of January, A. D. 1917, under Rule 8 of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office, and that the same constitute the Transcript of Record and return to the Writ of Error from the Supreme Court of the United States in the above-entitled cause, as made up and certified pursuant to said praecipe.

ATTEST my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23d day of January, A. D. 1917.

[Seal] F. D. MONCKTON,
Clerk.

In the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Writ of Error from Supreme Court, U. S.

United States of America,—ss.

The President of the United States of America to the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, and because of the order affirming the judgment of the District Court for the Territory of Alaska, Division No. 1, which said judgment, decision and order were made in the said cause wherein the Alaska Pacific Fisheries, a corporation, is plaintiff in error and the Territory of Alaska is defendant in error, which said cause involves the construction and application of the Constitution of the United States and in which a law of the Territory of Alaska is claimed to be in contravention of the Constitution of the United States and the decision of the said United States

Circuit Court of Appeals for the Ninth Circuit was against the title, right, privilege and exemption specifically set up and claimed by the plaintiff in error under the Constitution of the United States and in favor of the validity of the law of the Territory of Alaska, a manifest error hath happened, to the great damage of the Alaska Pacific Fisheries, a corporation, as by the record herein appears. We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 7th day of December, in the year of our Lord one thousand nine hundred and sixteen.

[Seal] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed the 7th day of December, 1916.

WM. H. HUNT,
Circuit Judge.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendant in error.

Dated at San Francisco, California, this 23d day of January, A. D. 1917.

THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Seal] By F. D. MONCKTON,
Clerk.

[Endorsed]: Writ of Error. Filed Dec. 7, 1916. F. D. Monckton, Clerk.

In the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2709.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Citation on Writ of Error from Supreme Court, U. S.

United States of America,—ss.

The President of the United States to the Territory of Alaska, GREETING:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, wherein the Alaska Pacific Fisheries is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Circuit Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 7th day of December, 1916.

WM. H. HUNT,
Circuit Judge for the United States Circuit Court of Appeals for the Ninth Circuit.

I, the undersigned, Governor of the Territory of Alaska, the defendant in error in the above-entitled cause, hereby acknowledge due service of the above Citation and enter an appearance in the Supreme Court of the United States this 8th day of January, A. D. 1917.

J. F. A. STRONG,
Governor of the Territory of Alaska.

[Endorsed]: Citation on Writ of Error from Supreme Court, U. S. Filed Jan. 20, 1917. F. D. Monckton, Clerk.

(25,741)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 911.

ALASKA PACIFIC FISHERIES, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF ALASKA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page
Caption	*a*
Addresses of counsel	1
Transcript of record from the district court of the United States for the district of Alaska	1
Complaint	1
Judgment	4
Bill of exceptions	6
Demurrer	6
Order on demurrer	13
Order settling bill of exceptions	14
Petition for writ of error	15
Assignment of errors	16
Order allowing writ of error	18
Bond on writ of error	19
Writ of error	22
Citation and service	24
Præcipe for record	25
Clerk's certificate	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1917.

	Page
Order of submission	31
Opinion, Hunt, J.	33
Judgment	37
Order denying petition for rehearing	38
Orders staying mandate	39
Petition for writ of error	41
Order allowing writ of error	42
Assignment of errors	42
Bond on writ of error	46
Præcipe for record	48
Clerk's certificate	50
Writ of error	52
Citation and service	56

No. 2731

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

[Names and Addresses of Attorneys.]

HELLENTHAL & HELLENTHAL, Juneau, Alaska,
Attorneys for Plaintiff in Error.

J. H. COBB, Juneau, Alaska,
Attorney for Defendant in Error.

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Complaint.

The above-named plaintiff complaining of the above-named defendant for cause of action alleges:

I.

The defendant is a corporation duly incorporated under and by virtue of the laws of the State of Oregon and doing business in the Territory of Alaska in taking and canning salmon, and has paid its annual license tax required for doing business as a corporation, under the laws of Alaska, and has paid all its license taxes under the act of Congress of June 26th, 1906, entitled "An act for providing and regulating all fisheries in Alaska," and has in all respects complied with the provisions of said act.

II.

That the defendant prosecuted the business of fishing for and canning salmon in Alaska between August 1st and December 31st, 1913, and during said period had canned 2627 cases of Sockeye and 117,119 cases of Cohoe or Chum salmon.

III.

That by an act of the Alaska legislature [1a*] approved April 29th, 1913, there thereby became due and owing to the Territory of Alaska under and by virtue of said act the sum of 7 cents per case for the 2627 cases of Sockeye salmon and ½ cent per case upon the 117,119 cases of Cohoe or Chum salmon, being a total of $769.48, which was due and payable to the Territory on or before January 15th, 1914, but the defendant has failed and refused to take out a license as provided in the act aforesaid or to pay the license taxes due and payable under said act.

WHEREFORE the plaintiff, the Territory of Alaska, prays judgment of the defendant for the sum of $769.48, with interest thereon from the said 15th day of January, 1914, to date at the rate of 8 per cent per annum and all costs herein incurred.

And for a second and further cause of action plaintiff alleges:

I.

It repeats the allegations of paragraph I hereof the same as if they were herein set out in full.

II.

That during the year 1914, the defendant engaged

*Page-number appearing at foot of page of original certified Record.

in the business of taking and canning salmon in Alaska; that during said year it canned 72 cases of King salmon, 27,158 cases of Sockeye and 116,558 cases of Cohoe or Chum salmon.

III.

That by the terms of the act of the territorial legislature approved April 29th, 1913, the defendant was obligated and bound to take out a license for carrying on said business and to pay a license tax thereon of 7 cents per case upon the said Sockeye and King salmon and ½ cent per case upon the said Cohoe or Chum salmon, which said tax became due and payable on or before [2] January 15th, 1915, but the defendant has failed, refused and neglected to take out said license or pay said taxes or any part thereof, and there is now due and owing the Territory for taxes for the year 1914, from the defendant for carrying on the business aforesaid, the sum of $2,488.89, with interest thereon at the rate of 8 per cent per annum from January 15th, 1915.

WHEREFORE the plaintiff, the Territory of Alaska, prays judgment in the said second cause of action for the sum of $2,488.89, with interest thereon as aforesaid and all costs herein incurred.

J. H. COBB,

Chief Counsel for the Territory of Alaska. [3]

United States of America,
Territory of Alaska,—ss.

J. H. Cobb being first duly sworn on oath deposes and says: I am chief counsel for the Territory of Alaska. I have read the above and foregoing com-

plaint and the same is true as I verily believe.

J. H. COBB.

Subscribed and sworn to before me this the 31st day of December, 1915.

[Notarial Seal] E. L. COBB,
Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By L. E. Spray, Deputy. [4]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Judgment.

This cause came on regularly to be heard, upon the demurrer of the defendant to the plaintiff's Complaint, Mr. Hellenthal appearing for and Mr. Cobb against, and the Court having heard said demurrer and being fully advised in the premises, overrules the same, to which ruling the defendant then and there excepted.

And the defendant in open court announced that it did not desire leave to answer, but elected to stand upon the said demurrer, whereupon the plaintiff, by

Mr. Cobb, moved the Court for judgment, and the motion is granted.

IT IS THEREFORE CONSIDERED BY THE COURT and it is so ordered and adjudged, that the plaintiff, the Territory of Alaska, do have and recover of and from the defendant, the Alaska Pacific Fisheries, a corporation, on its first cause of action the sum of $769.48 with interest thereon from January 15th, 1914, at the rate of 8 per cent per annum, aggregating $885.05, and upon its second cause of action the sum of $2,488.89 with interest thereon at the rate of 8 per cent per annum from January 15th, 1915, aggregating $2611.40, and aggregating in all [5] $3,496.45, with interest thereon from the date hereof at the rate of 8 per cent per annum, and all costs, for all of which let execution issue.

Dated this 31st day of December, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [6]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the defendant herein duly and regularly and within the time provided by law therefor filed its Demurrer, which is in words and figures as follows:

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,

Defendant.

Demurrer to Plaintiff's Complaint.

Comes now the defendant, and demurs to complaint of plaintiff herein on the following grounds, to wit:

I.

That the facts stated in said complaint are not sufficient to constitute a cause of action against defendant or at all.

II.

That the act of Congress dated June 26, 1906, the same being chapter 3, title 7, of the laws of Alaska relating to fish and fisheries, which said act deals with salmon fisheries and provides for payment of certain license taxes by those engaged in the business of canning, curing and preserving fish, and manufacturing fish products within the Territory of Alaska in lieu of all other license fees and taxes therefor and thereon, is still in full force and effect, neither the same nor any part [7] thereof having been repealed by

subsequent legislation, and the defendant, having paid the license tax provided thereby and therein, and having received a license in compliance with said act, said license fee and tax having been paid in lieu of all other taxes, is not subject to or liable for other license fees or taxes.

III.

That under the provisions of chapter 52 of the acts of the territorial legislature of Alaska for the year 1913, being an act entitled "An act to establish a system of taxation, create revenue and provide for the collection thereof for the Territory of Alaska and other purposes," being the act set forth in the complaint and which is relied upon as a basis and foundation for the case and action against defendant, no civil liability is created and the defendant, Alaska Pacific Fisheries, is not made by the provisions of that act, civilly liable to the Territory of Alaska for the payment of any sum whatsoever, nor does said act contain any provisions under which said Alaska Pacific Fisheries could or did become indebted to the Territory of Alaska in any sum whatsoever.

That said act merely makes it an offense to prosecute or attempt to prosecute any of the lines of business therein mentioned, without first applying for and obtaining a license so to do, making said offense a misdemeanor and punishable as provided in said act, without providing that those prosecuting or attempting to prosecute any of the lines of business for which said license is required, shall be indebted to the Territory of Alaska in any sum whatsoever.

That the provisions of chapter 76 of the acts of the

territorial legislature for the year 1915, referred to in the complaint, if construed to impose a civil liability for a tax in connection with the operation of fisheries or of canning fish prior to its enactment, is retroactive and therefore void, and is obnoxious to the provisions of the Constitution of the United States in that regard.

That no civil remedy for the collection of license taxes imposed or sought to be imposed by the provisions of chapter 52 of the Session Laws of the Territory of Alaska for the year 1913 above referred to, or for the collection or enforcement of any other obligation imposed or sought to be imposed by said act, provided for by said act, said act making it solely a criminal offense for which no remedy except such as is resorted to in the enforcement of criminal laws is provided, and that if chapter 76 of the Session Laws of the Territory of Alaska for the year 1915, referred to, is so construed as to substitute a remedy under civil procedure in place of a remedy under criminal procedure or as adding a civil remedy in addition to the remedy under criminal procedure, said act is retroactive and *ex post facto* in that regard, and void as being in conflict with and obnoxious to the provisions of the Constitution of the United States.

[8]

Further, that no liability can exist under the provisions of chapter 52 of the Session Laws for the year 1913, of the Territory of Alaska, above referred to, in view of the fact that chapter 76 of the Session Laws of the Territory of Alaska for the year 1915 repeals the same.

IV.

That chapter 52 of the acts of the territorial legislature for the year 1913, referred to in the complaint, is void, especially in so far as it relates to the matters and things referred to in the complaint herein for the reason that it was and is impossible for the Alaska Pacific Fisheries to comply with the provisions of said act, and to apply for and obtain a license as therein provided in that said act requires salmon canneries and the defendant, as an owner of such canneries, to apply for and procure a license in advance and pay therefor in advance, an amount which cannot or could not be determined until the close or after the close of the season's operations, in that the amount to be paid depends upon the number of cases of the various kinds of salmon packed during the year for which the license is obtained, making it impossible to ascertain in advance what the amount of license to be paid is, for any given year.

Further, that it would be impossible for a Court or Judge thereof to pass upon the application made by the defendant, if such application had been made in compliance with the provisions of said act, for the reason that it would be impossible for the Court or Judge thereof to determine whether the amount paid were correct or not correct, since that matter could be determined only upon the conclusion of the season's work, when the number of cases of each kind of fish had been determined upon and could be counted.

Further, that said provisions of chapter 52 of the Session Laws of the Territory of Alaska for the year 1913, in so far as they relate to matters at issue here-

in, are void because the penalty imposed is so indefinite that the Court could not pronounce judgment upon a conviction or plea of guilty, since the amount fixed as a penalty for the first offense is the amount of the license, for the second offense twice the amount and so on, the penalty for each offense depending upon the amount of the license, which it would be impossible to determine in any case unless the act had been violated throughout the entire season, in order that the amount of the pack for that season could be determined upon, and if the act had been violated for a whole season, it could not be enforced because the penalty imposed would be confiscatory and so severe as to be unusual and in violation of the provisions of the Federal Constitution in that regard.

And further, that said act is void because it would be impossible for the defendant to comply therewith in that the clerk of the court could not act as an officer for the Territory of Alaska, in receiving a license fee or issuing a license, and that the Judge could not act as a territorial officer in [9] passing upon a license.

V.

That under the averments of the complaint the defendant could not comply with the provisions of the act above referred to as chapter 52 of the Session Laws of the Territory of Alaska for the year 1913, in view of the fact that the clerk of the court did not file a bond as provided for in said act, and did not qualify to act under the provisions of said act, so as to be qualified to accept moneys or otherwise to act under the provisions of said act, in connection with the issuance of licenses.

VI.

That said act, chapter 52 of the Session Laws of the Territory of Alaska for the year 1913, above referred to, is void especially in so far as it relates to matters and things referred to in the complaint, for the reason that under its provisions defendant is compelled to make application to the District Court or Judge thereof for a license to carry on a useful business necessary to society, and to use its property, to wit, its salmon canneries, reposing in said court or Judge thereof the arbitrary power to grant or refuse said license, and giving said court or Judge thereof the power to arbitrarily or capriciously deny the defendant the right to carry on the business of canning salmon and the right to employ and use its salmon canneries in conducting the business for which the same were designed, same being a lawful and useful occupation and business.

That the provisions above referred to are an invasion of the defendant's right to private property, depriving it of property without due process of law and denying to defendant the privileges and immunities to which it is entitled under the provisions of the Constitution of the United States, and otherwise conflicts and is obnoxious to the provisions of the Constitution of the United States.

VII.

That said chapter 52 of the Session Laws of the Territory of Alaska for the year 1913 is void, especially in so far as it relates to the facts in this case, for the further reason that under the provisions of said act, a license is required not for the purpose

of regulation under police power but for the purpose of raising revenue under the taxing power and for the last-mentioned purpose only.

That under the provisions of the Organic Act of the Territory of Alaska, providing for a legislature and conferring thereon powers therein mentioned, said legislature has not the authority to impose a license tax or require a license fee for the purpose of taxation or for the purpose of raising revenue, and that the power of said legislature in the collection of taxes is limited by the following provisions: "All [10] taxes shall be uniform upon the same classes of subjects, and shall be levied and collected under general laws, and assessments shall be according to the actual value thereof," as well as by other provisions contained in the Organic Act.

That under the provisions and limitations contained in the said Organic Act, the territorial legislature has not the power or authority to impose a license tax or require the payment of license fees, for the purpose of raising revenue. That the license sought to be imposed under the provisions of chapter 52 of the Sessions Laws of the Territory of Alaska for the year 1913, above referred to, is imposed without any assessment whatsoever and without any regard to the value of the subject or thing sought to be taxed, contrary to the provisions of the Organic Act in that regard.

VIII.

Further, that the tax sought to be collected in this action is, in fact, a specific tax upon property and is imposed without regard to the value of the

property taxed, and without any assessment on the property sought to be taxed, contrary to provisions of the Organic Act.

IX.

Further that said tax is a violation of the provisions of the Organic Act in that it is not uniform upon the same classes of subjects.

HELLENTHAL & HELLENTHAL,
Attorneys for the Defendant.

BE IT FURTHER REMEMBERED that thereafter this cause came on regularly for hearing on the demurrer of the defendant so filed and the Court being fully advised in the premises overruled said demurrer, to which ruling and order of the Court the defendant, by counsel, then and there excepted, on the grounds set forth in the demurrer, as well as other grounds, including the ground that no liability exists under the facts stated in the complaint; that the act of the territorial legislature relied upon in the complaint as a basis for the alleged liability is void especially in so far as it relates to the facts set up in the complaint, for the reason that the same is in conflict with the provisions of the Constitution [11] of the United States in the particulars pointed out in the demurrer as well as in other particulars and violates the provisions of the Organic Act in the particulars pointed out in the demurrer, as well as in other particulars, which exception was then and there allowed by the Court.

Whereupon the defendant electing to stand on its demurrer, the Court entered judgment herein, to which action of the Court in so entering judgment,

the defendant by counsel duly excepted, which exception was allowed by the Court.

[Order Settling and Allowing Bill of Exceptions, etc.]

And now this matter coming on to be heard on the application of the defendant to have the above and foregoing bill of exceptions settled and allowed by the Court and made a part of the record herein, and the Court being fully advised in the premises, now settles and allows the above and foregoing as the full, true and correct bill of exceptions herein, and orders that the same be made part of the record and the Court hereby certifies that the above and foregoing bill of exceptions contains a full and complete record of the proceedings had in this cause and is signed, settled and allowed by the Court as in all respects speaking the truth and is made part of the record herein.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [12]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416-A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

Case No. 1416-A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Petition for Writ of Error.

To the Honorable ROBERT W. JENNNGS, Judge of the District Court for the Territory of Alaska, Division Number One:

Now comes the above-named Alaska Pacific Fisheries, a Corporation, the plaintiff in error herein, by its attorneys, Hellenthal & Hellenthal, and complains that in the record and proceedings had in the District Court for the Territory of Alaska, Division Number One, in case No. ——, the Territory of Alaska, plaintiff, and defendant in error, against the Alaska Fisheries, defendant, and plaintiff in error, and also in the rendition of the judgment in said cause in the District Court for the Territory of Alaska, Division Number One, against the Alaska Pacific Fisheries on the 31st day of December, 1915, wherein the District Court for the [13] Territory of Alaska adjudged the defendant, the Alaska Pacific Fisheries, to be indebted to the plaintiff, the Territory of Alaska, in the sum of $3,496.45, and wherein the plaintiff, the Territory of Alaska, was given judgment against the defendant, the Alaska Pacific

Fisheries, for the sum of $3,496.45 and costs, taxed at $——, manifest error hath happened to the great damage of said Alaska Pacific Fisheries, as will more fully appear from the assignment of errors filed herewith.

WHEREFORE the Alaska Pacific Fisheries prays for the allowance of a writ of error, and for an order fixing the amount of the bond in said cause, and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 31st day of December, A. D. 1915.

HELLENTHAL & HELLENTHAL,
Attorneys for Alaska Pacific Fisheries.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [14]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

Case No. 1416–A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Assignment of Errors.

Comes now the Alaska Pacific Fisheries, the plaintiff in error, and assigns the following errors committed by the Court in connection with the trial and rendition of judgment herein, the errors so assigned being the errors which the plaintiff in error intends to urge before the United States Circuit Court of Appeals for the Ninth Circuit, and are the errors relied upon for a reversal of the judgment herein:

First Error Assigned.

The Court erred in overruling the demurrer of the defendant herein. [15]

Second Error Assigned.

That the Court erred in entering judgment herein for the plaintiff and against the defendant.

HELLENTHAL & HELLENTHAL,
Attorneys for Alaska Pacific Fisheries.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [16]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,

Defendant.

Order [Allowing Writ of Error and Fixing Amount of Supersedeas and Cost Bond].

This matter coming on to be heard on the petition of the Alaska Pacific Fisheries, for a writ of error, and the assignment of errors having been regularly filed with said petition, the writ of error is hereby allowed as prayed for in said petition and the amount of the supersedeas and cost bond is fixed at four thousand ($4,000) dollars, to be approved by the Court or the clerk thereof.

Dated this 31st day of December, 1915.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [17]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,

Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

Case No. 1416–A.

ALASKA PACIFIC FISHERIES, a Corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS that we, the Alaska Pacific Fisheries, a Corporation, as principal, and B. M. Behrends, as surety, are held and firmly bound unto the above-named Territory of Alaska in the just and full sum of Four Thousand ($4,000) Dollars to be paid to the said Territory of Alaska, its attorneys or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 31st day of December, A. D. 1915.

WHEREAS, lately in the District Court for the

Territory of Alaska, Division Number One, in an action therein pending between the Territory of Alaska, as plaintiff, and The Alaska Pacific Fisheries, as defendant, a judgment was [18] rendered against the said Alaska Pacific Fisheries for the sum of $—— and costs, and the said Alaska Pacific Fisheries having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid action and the citation directed to the said Territory of Alaska, citing and admonishing it to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty days from the date of approval of this bond.

Now, the condition of the above obligation is such that if the said Alaska Pacific Fisheries shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then and in that event the above obligation to be void, otherwise to remain in full force and virtue.

ALASKA PACIFIC FISHERIES.
By J. A. HELLENTHAL,
Its Attorney,
Principal.
B. M. BEHRENDS,
Surety.

Signed, sealed and delivered in the
H. J. TURNER.
MISS BURKLAND.

The above and foregoing Supersedeas and cost bond is hereby duly approved, not only as to form,

but also as to the surety thereon, this 31st day of December, 1915.

ROBERT W. JENNINGS,
Judge of the District Court for the Territory of Alaska, Division Number One.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [19]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

Case No. 1416–A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable ROBERT W. JENNINGS, Judge of the District Court for the Territory of Alaska, Division Number One, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment of a plea, which is in said District Court, Division Number One thereof, before you, between the Territory of Alaska, as plaintiff, and the Alaska Pacific Fisheries, a corporation, as defendant, a manifest error hath happened to the great prejudice and damage of the said Alaska Pacific Fisheries as set forth and appears by the petition herein,

We, being willing that error, if any hath happened, [20] should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the records and proceedings aforesaid with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at said place and said Circuit on or before thirty days from the date hereof that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United

States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 31st day of December, A. D. 1915.

Attest my hand and the seal of the District Court for the Territory of Alaska, Division Number One, at the clerk's office at Juneau on the day and year last above written.

[Seal] J. W. BELL,
Clerk of the District Court for the Territory of Alaska, Division Number One.

By C. Z. Denny,
Deputy.

Allowed this 31st day of December, A. D. 1915.
ROBERT W. JENNINGS,
Judge.

Service admitted this Dec. 31st, 1915.
J. H. COBB,
Chf. Counsel Ter. of Alaska.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [21]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

United States Circuit Court of Appeals for the Ninth Circuit Holden at San Francisco.

Case No. 1416-A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY of ALASKA,
Defendant in Error,

Citation on Writ of Error.

The President of the United States to the Territory of Alaska, the Above-named Plaintiff, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty (30) days from the date of this Citation, pursuant to a Writ of Error filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, wherein the Alaska Pacific Fisheries, a Corporation, is the plaintiff in error and you, the said Territory of Alaska, are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should [22] be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 31st day of De-

cember, A. D., 1915, and of the Independence of the United States the 139th.

[Seal] ROBERT W. JENNINGS,
Judge.

Service of the foregoing citation admitted this the 31st day of Dec. 1915.

J. H. COBB,
Chief Counsel for the Ter. of Alaska.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [23]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Praecipe [for Transcript of Record].

Kindly prepare and transmit to the Circuit Court of Appeals for the Ninth Circuit copies of the following: Complaint, Bill of Exceptions, Judgment, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Bond on Writ of Error, Writ of Error, Citation on Writ of Error.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [24]

In the District Court for the District of Alaska, Division No. One, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

Certificate [of Clerk U. S. District Court to Transcript of Record].

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 24 pages of typewritten matter, numbered from 1 to 24, both inclusive, constitute a full, true, and complete copy, and the whole thereof, prepared in accordance with the praecipe of defendant and plaintiff in error, on file in my office and made a part hereof, in Cause No. 1416-A. wherein Alaska Pacific Fisheries, a Corporation, is defendant and plaintiff in error and Territory of Alaska is plaintiff and defendant in . rror.

I further certify that the said record is by virtue of the writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and the cost of preparation, examination and certificate, amounting to Eleven and 25/100 Dollars ($11.25) has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court this 31st day of December, 1915.

[Seal]

J. W. BELL,
Clerk.

By _____,
Deputy. [25]

[Endorsed]: No. 2731. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Pacific Fisheries, a Corporation, Plaintiff in Error, vs. Territory of Alaska, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed January 7, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed Jan. 31, 1916. F. D. Monckton, Clerk.

No. 2731

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the seventh day of March, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

Nos. 2709 and 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Order of Submission.

ORDERED, above-entitled cause argued by Mr. J. A. Hellenthal, counsel for the plaintiff in error, and by Mr. J. H. Cobb, counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the fifth day of September, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the cases were heard, ORDERED, that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed, and recorded in the Minutes of this court, in each of the causes in accordance with the opinion filed therein: * * * Alaska Pacific Fisheries, a Corporation, Plaintiff in Error, vs. Territory of Alaska, No. 2731. * * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Opinion, U. S. Circuit Court of Appeals.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL, of Juneau, Alaska, for Plaintiff in Error;

J. H. COBB, Chief Counsel for the Territory of Alaska, of Juneau, Alaska, for Defendant in Error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

This is an action brought to recover taxes claimed to be due under the Act of the Territorial Legislature of Alaska for prosecuting the business of fishing for and canning salmon in Alaska between August 1 and December 31, 1913, during which period plaintiff in error canned various quantities of salmon.

The contention of the Territory is that by an Act of the Alaska legislature approved May 1, 1913, there became due to the Territory $769.48, payable

on or before January 15, 1914, and the sum of $2,488.89, with interest, alleged to be due for failure on the part of the plaintiff in error to take out a license to carry on the business of taking and canning salmon during the year 1914, the tax being alleged to be due before January 15, 1915.

Judgment was entered in favor of the Territory after demurrer had been sustained and defendant had elected to stand upon the demurrer.

HUNT, Circuit Judge, after stating the facts:

The questions presented are: (1) Does the Act of the Territorial Legislature of 1913 which establishes a system of taxation, creates revenue and provides for collection thereof, for the Territory of Alaska, and for other purposes, create any civil liability? (2) Does this Act just referred to, taken in connection with the subsequent Act of the legislature of Alaska passed in 1915, provide for any civil remedy? (3) Is the act of the Territorial Legislature of 1913 valid? (4) Can plaintiff in error be held liable in view of the provisions of the Act of Congress of June, 1906?

Counsel for plaintiff in error, in their opening brief, devote much attention to the argument that the Act of the Alaska legislature of May 1, 1913, creates no civil liability, and invoke the ruling of this court in United States v. Jordan, 193 Fed. 986; but under the conditions existing in the present case we do not regard that case as controlling. There the court held that a civil action by the United States would not lie to recover the wholesale fee of a retail liquor dealer who was selling at wholesale in violation of the

statute, the court resting its decision upon the ground that a civil action could not be brought because there was no provision, express or implied, in the statutes of Alaska for the recovery of the license fee by civil action. The case is to be distinguished in that by the Act of the legislature of Alaska of 1915 there is a civil remedy for the collection of the license tax due under the Revenue Act of 1913 which is effectual, as we have pointed out in Alaska Mexican Gold Mining Company v. Territory of Alaska, No. 2727, *ante.*

As to the points that the Act is invalid because it is indefinite and uncertain and incapable of enforcement, we need add but little to what was said in the case of Alaska Mexican Gold Mining Company v. Territory of Alaska. A careful reading of Section 3 of the Act of 1913, which provides that any person doing, or attempting to do business, in violation of the provisions of the Act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined, demonstrates that when it is considered with the other sections of the Act, the doing of business without a license was the essential thing to be prohibited. Where the license called for could be paid in advance, of course it was plainly the mandate of the law that it should be; but where it could not be so paid because of the indeterminate nature of the amount of the license taxes, obviously the procedure for exacting payment for the license in advance would practically be impossible of application; hence a construction of the statute whereby payment in

advance must be made would make the law absurd. The rule, however, is too often announced that statutes shall receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion. Lau On Bew v. United States, 144 U. S. 47; Holy Trinity Church v. United States, 143 U. S. 457; Henderson v. Mayor, 92 U. S. 259; Oates v. National Bank, 100 U. S. 239. This can be done in the present case by simply giving that reasonable effect to the language of the Act which will carry out its unmistakable purpose to compel persons doing any of the businesses enumerated in the statute to apply for a license before doing business and to pay the license tax in advance, if it can be fixed in amount; or if it cannot be so determined until after a period, then payment is to be deferred until determination can be had. But as the obligation to pay became fixed, and remedy for its enforcement by civil action was granted by the Act of 1915, we think the court was correct in holding the law to be valid and the collection enforceable.

In respect to the constitutionality of the law, we shall follow the rule laid down in Alaska Pacific Fisheries v. Territory of Alaska, No. 2709, *ante*.

The judgment of the District Court is affirmed.

[Endorsed]: Opinion. Filed Sept. 5, 1916. Frank D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error,

Judgment, U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the District of Alaska, Division No. 1.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Alaska, Division No. 1, and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for its costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and Entered Sept. 5, 1916. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October term A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Order Denying Petition for a Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the case was heard, it is ORDERED that the petition, filed October 4, 1916, on behalf of the plaintiff in error, for a rehearing of the above-entitled cause be, and hereby is denied.

At a stated term, to wit, the October term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the thirteenth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: the Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2731.

ALASKA PACIFIC FISHERIES, a Corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

Order Staying Issuance of Mandate Forty Days from October 13, 1916.

Upon motion made on behalf of counsel for the plaintiff in error, and good cause therefor appearing, ORDERED, issuance of Mandate under rule 32 of this court in the above-entitled cause, stayed for a period of forty (40) days from date.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2731.

ALASKA PACIFIC FISHERIES (a Corporation),

Petitioner,

vs.

TERRITORY OF ALASKA,

Respondent.

Order Staying Mandate Forty Days from November 15, 1916.

Upon application made upon behalf of counsel for petitioner, and good cause appearing therefor, IT IS ORDERED that issuance of Mandate under Rule 32 of this court be stayed for a period of fifty days from this date.

WM. B. GILBERT,
Presiding Judge.
WM. H. HUNT,
Judge.

Dated November 15th, 1916.

[Endorsed]: Order Staying Mandate. Filed November 16, 1916. F. D. Monckton, Clerk.

In the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Petition for and Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

Considering itself aggrieved by the decision of the United States Circuit Court of Appeals in rendering judgment against it and in affirming the judgment of the lower court, in the above-entitled cause, the plaintiff in error hereby prays for a writ of error from the said decision and judgment to the Supreme Court of the United States, and asks that an order be made fixing the amount of a supersedeas bond.

The assignment of errors is presented herewith.

HELLENTHAL & HELLENTHAL,
J. A. HELLENTHAL,
Attorneys for Plaintiff in Error.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

It is hereby ordered that the writ of error is allowed as prayed for and that the same shall issue, and that the amount of the supersedeas bond is fixed at four thousand ($4,000.00) dollars. That when the Alaska Pacific Fisheries, the plaintiff in error, executes said bond and the same shall have been approved, it shall act as a supersedeas.

Dated this 7th day of December, 1916.

WM. H. HUNT,
Circuit Judge.

[Endorsed]: Petition for and Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond. Filed Dec. 7, 1916. F. D. Monckton, Clerk.

In the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Assignment of Errors.

Comes now the above-named plaintiff in error and files herewith its Petition for a Writ of Error, and says that there are errors in the record of the pro-

ceedings in the above-entitled case, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding and deciding that Chapter 52 of the Session Laws of the First Territorial Legislature for the Territory of Alaska, which forms the basis of this action, was valid, especially in so far as it applied to the facts in this case. The validity of said act of the Territorial Legislature for the Territory of Alaska, especially in so far as it applies to the facts in this case, was denied and drawn in question by the plaintiff in error in the trial court in the first instance, and again when the cause was presented to the United States Circuit Court of Appeals for the Ninth Circuit, on writ of error for review, on the ground that the same, in so far as it applied to the facts in this cause, was repugnant to the Constitution of the United States and in contravention thereof; and

Further, the validity of said act was denied and drawn in question by the plaintiff in error in the trial court in the first instance and before the United States Circuit Court of Appeals for the Ninth Circuit when the cause was there presented for review on writ of error, on the ground that said act was repugnant to the provisions of the Organic Act of the Territory of Alaska and in contravention thereof; and

Further, that said act was void on the ground that it required of your petitioner the doing of that

which was impossible. The said errors are more particularly set forth as follows:

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding and deciding:

First: That the fact that under said act power was conferred upon the Court or Judge to arbitrarily and capriciously either grant or deny to your petitioner permission to operate its fisheries in the form of a license to do this without due process of law, or without any process whatsoever, and thus deprive your petitioner of the right to follow its business of fishing and of the right to operate its fisheries and enjoy and use its property without compensation and without excuse or reason except the arbitrary will and caprice of the Court or Judge did not impair or destroy the validity of the said act of the Territorial Legislature which forms the basis of this proceeding, and in holding and deciding that such power might lawfully be conferred upon the Court or Judge; and in further holding and deciding that the plaintiff in error was not in a position to urge the invalidity of the act on this account or to insist upon its constitutional rights in this regard because it had not applied to the Court or Judge for a license under the provisions of the act.

Second: That said act of the Territorial Legislature was not repugnant to the provisions of the Organic Act of the Territory of Alaska, it having been urged by the plaintiff in error that the tax sought to be collected under the provisions of that act did not comply with the requirements of Section

9 of the Organic Act for the Territory, providing that

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof."

In this regard the United States Circuit Court of Appeals erred in holding and deciding that the tax sought to be collected under this act by the Territorial Legislature was a license tax, and that being a license tax it was not necessary to its validity that it should comply with all or any of the provisions of section 9 of the Organic Act above referred to.

The United States Circuit Court of Appeals for the Ninth Circuit also erred in holding and deciding that the act in question was a license tax and not a property tax.

Third: That it was not impossible for the plaintiff in error to comply with the provisions of Chapter 52 of the Acts of the First Territorial Legislature, above referred to, and that the act was not void because the same could not be complied with.

For which errors, the plaintiff in error, the Alaska Pacific Fisheries, a corporation, prays that the said judgment of the United States Circuit Court of Appeals for the Ninth Circuit, and the order of said Court affirming the judgment of the trial court be reversed, and a judgment rendered in favor of the plaintiff in error, and for costs.

HELLENTHAL & HELLENTHAL,
J. A. HELLENTHAL,
Attorneys for Alaska Pacific Fisheries.

[Endorsed]: Assignment of Errors. Filed Dec. 7, 1916. F. D. Monckton, Clerk.

In the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, the Alaska Pacific Fisheries, a corporation, as principal, and The Aetna Accident and Liability Company, a Corporation, as sureties, are held and firmly bound unto the Territory of Alaska in the sum of $4,000.00, to be paid to the said Territory of Alaska, to which payment well and truly to be made we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of December, 1916.

WHEREAS, the above-named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court, to reverse the judgment and order rendered in the above-entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

ALASKA PACIFIC FISHERIES.
By J. A. HELLENTHAL,
Its Attorney.
THE AETNA ACCIDENT AND LIABILITY COMPANY.
By LELAND W. CUTLER,
Resident Vice-president.
[Seal] Attest: R. A. KELLER,
Resident Asst. Secty.

Bond approved, and to operate as a supersedeas. Dated the 8th day of December, 1916.

WM. H. HUNT,
United States Circuit Judge.

[Endorsed]: Supersedeas Bond on Writ of Error. Filed Dec. 8, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

Praecipe for Certified Transcript of Record on Return to Writ of Error from Supreme Court of United States.

To the Clerk of the said Court:

Sir: Please make and furnish me with a certified transcript of the record (including the proceedings had in said Circuit Court of Appeals), and not less than thirty uncertified copies thereof, for use on Writ of Error from the Supreme Court of the United States in the above-entitled cause, the said transcript to consist of a copy of the following:

Printed transcript of record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following-entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

Order of Submission, entered March 7, 1916;

Order Directing Filing of Opinion, etc., entered Sept. 5, 1916;

Opinion, filed Sept. 5, 1916;

Judgment, filed and entered Sept. 5, 1916;

Order Denying Petition for Rehearing, entered Oct. 9, 1916;

Order Staying Issuance of Mandate, entered Oct. 13, 1916;

Order Staying Issuance of Mandate, filed Nov. 16, 1916; and

The following papers on Writ of Error returnable in the Supreme Court of the United States:

Petition and Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond, filed Dec. 7, 1916;

Assignment of Errors, filed Dec. 7, 1916;

Supersedeas Bond;

Praecipe for Transcript of Record;

Writ of Error, filed Dec. 7, 1916;

Citation on Writ of Error;

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record.

Please prepare thirty or more uncertified copies of said record by printing thirty or more copies of the above-entitled proceedings that were had and papers that were filed in said cause in said Circuit Court of Appeals, and by binding one of the latter printed copies of said proceedings, etc., at the end of each of the thirty or more extra copies of the printed transcript of record on which said cause was heard in said Circuit Court of Appeals.

J. A. HELLENTHAL,
Attorney for Plaintiff in Error.

Service of the within praecipe is admitted this 8th day of January, A. D. 1917.

J. F. A. STRONG,
Governor for the Territory of Alaska, the Defendant in Error.

[Endorsed]: Praecipe for Certified Transcript of Record on Return to Writ of Error from Supreme Court, U. S. Filed Jan. 20, 1917. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Return to Writ of Error from the Supreme Court of the United States.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-nine (49) pages numbered from and including 1 to and including 49, to be a true copy of the record, and of the assignment of errors, and of all proceedings had in the above-entitled case, made up pursuant to the praecipe filed by counsel for the plaintiff in error on the 20th day of January, A. D. 1917, under Rule 8 of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office, and that the same constitute the Transcript of Record and return to the Writ of Error from the Supreme Court of the United States in the above-entitled cause, as made up and certified pursuant to said praecipe.

ATTEST my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23d day of January, A. D. 1917.

[Seal] F. D. MONCKTON,
Clerk.

In the Supreme Court of the United States.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Writ of Error from Supreme Court, U. S.

United States of America,—ss.

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, and because of the order affirming the judgment of the District Court for the Territory of Alaska, Division No. 1, which said judgment, decision and order were made in the said cause wherein the Alaska Pacific Fisheries, a corporation, is plaintiff in error, and the Territory of Alaska is defendant in error, which said cause involves the construction and application of the Constitution of the United States and in which a law of the Territory of Alaska is claimed to be in contravention of the Constitution of the United States and the decision of the said United States

Circuit Court of Appeals for the Ninth Circuit was against the title, right, privilege and exemption specifically set up and claimed by the plaintiff in error under the Constitution of the United States and in favor of the validity of the law of the Territory of Alaska, a manifest error hath happened, to the great damage of the Alaska Pacific Fisheries, a corporation, as by the record herein appears. We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 7th day of December, in the year of our Lord one thousand nine hundred and sixteen.

[Seal] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed the 7th day of December, 1916.

WM. H. HUNT,
Circuit Judge.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendant in error.

Dated at San Francisco, California, this 23d day of January, A. D. 1917.

THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Seal] By F. D. MONCKTON, Clerk.

[Endorsed]: Writ of Error. Filed Dec. 7, 1916. F. D. Monckton, Clerk.

In the Supreme Court of the United States.

In the United States Circuit Court of Appeals, for the Ninth District.

No. 2731.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Citation on Writ of Error from Supreme Court, U. S.

United States of America,—ss.

The President of the United States to the Territory of Alaska, GREETING:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the United States Circuit Court of Appeals for the Northern Circuit, wherein the Alaska Pacific Fisheries is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Circuit Judge of the United States

Circuit Court of Appeals for the Ninth Circuit, this 7th day of December, 1916.

WM. H. HUNT,
Circuit Judge for the United States Circuit Court of Appeals for the Ninth Circuit.

I, the undersigned, Governor of the Territory of Alaska, the Defendant in Error in the above-entitled cause, hereby acknowledge due service of the above Citation and enter an appearance in the Supreme Court of the United States this 8th day of January, A. D. 1917.

J. F. A. STRONG,
Governor of the Territory of Alaska.

[Endorsed]: Citation on Writ of Error from Supreme Court, U. S. Filed Jan. 20, 1917. F. D. Monckton, Clerk.

INDEX.

	Page
Statement of the case	1

Cases Cited.

Banger's Appeal, 109 Pa. State, 79	27
City of St. Louis vs. Spiegel, 2 S. W., 839	19
Cooley on Taxation, 396–7	10
2 Dillon on Municipal Corp., Sec. 768	10
Ellis vs. Frazier, 63 Pac., 642	23
Ex parte Schuler, 139 Pac., 985	11
Fire Department of Milwaukee vs. Holvanstein, 16 Wis., 136	30
Henderson vs. London & Lancashire Ins. Co., 135 Ind., 24	13
Johnson vs. Macon, 62 Ga., 645	12
Minces vs. Schoenig, 75 N. W., 711	14
Morrill vs. State, 38 Wis., 428	30
People vs. Martin, 60 Cal., 153	9
Pittsburg, C. & St. L. R. R. Co. vs. State, 32 N. E., 435	21
Portland Bank vs. Apthorp, 12 Mass., 252	16
Reser vs. Umatilla County, 86 Pac., 595	25
State vs. Pennoyer, 65 N. H., 113	18
State vs. Willingham, 9 Wyo., 290	30
State vs. Whitcom, 122 Wis., 110	30
In re Tax Delinquency in St. Louis County, 75 N. W., 970	14
In re Wan Yin, 22 Fed., 701	24
In re Watson, 97 N. W., 465	28
Welton vs. State, 91 U. S., 278	8
Willis vs. Standard Oil Co., 52 N. W., 652–4	14
Ex rel. Wyatt vs. Ashbrook, 72 Am. State Rep., 765	20

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 117.

ALASKA PACIFIC FISHERIES, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF ALASKA, DEFENDANT IN ERROR.

No. 118.

ALASKA PACIFIC FISHERIES, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF ALASKA, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The various propositions urged by the Attorney General have been discussed in our opening brief and will not there-

fore be further discussed here. The Attorney General, however, cites some cases in support of the contention that license taxes are not subject to the constitutional provisions requiring uniformity and assessment according to value. The cases cited, however, do not sustain the contention made. They either relate to license fees exacted under the police power, or were decided in States where the constitutional provisions were expressly limited to property taxes, or where license taxes were expressly excepted from their operation. In the opening brief we pointed out the reason why decisions relating to license fees had no application to license taxes, and the inapplicability of the other cases cited by the Attorney General, is best pointed out by considering the constitutional provisions under which the cases arose. We will, accordingly, set forth, as concisely as possible, the constitutional provisions of the various States and a reference to the decisions under each.

The constitution of the State of Alabama contains the following provisions: "All taxes levied on property in this State shall be assessed in exact proportion to the value of such property * * * . The legislature shall not enact any law which will permit any person, firm, corporation or association to pay a privilege, license or other tax to the State of Alabama, and relieve him or it from the payment of all other privilege and license taxes in the State."

The constitution of the State of Arkansas provides as follows: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

The constitution of the State of Florida provides as follows: "The legislature shall provide for a uniform and equal rate of taxation and shall prescribe such regulations as shall secure a just valuation of all property * * * . The legislature may also provide for levying a special capitation tax and a tax on licenses."

The constitution of the State of Illinois contains the following provisions: "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons, to be selected or appointed in such manner as the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests, or business, vendors of patents and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

The constitution of the State of Idaho contains the following provisions: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, or her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this State); also a per capita tax * * *. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation of all property, real and personal."

The Montana constitution provides as follows: "The necessary revenue for the support and maintenance of the State shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The Legislative Assembly may also impose a license tax, both upon persons and upon corporations doing business in the State."

The constitution of Nebraska contains the following provision: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the tax to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, in such manner as it shall direct, uniform as to the class on which it operates."

The constitution of the State of Louisiana contains the following provision: "Taxes shall be equal and uniform throughout the limits of the authority levying the tax, and all property shall be taxed in proportion to its value." Provision is also made for a license tax, to be graduated upon persons pursuing the several trades, professions, vocations, and callings. All occupations may be liable to such tax except those of clerks, laborers, clergymen, school teachers, those engaged in mechanical, horticultural, agricultural, and mining pursuits, and manufacturers, other than those of distilled, alcoholic, or malt liquors, tobacco, cigars, and cottonseed oil.

The constitution of the State of North Carolina provides as follows: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation,

and shall prescribe regulations to secure a just valuation for taxation of all property * * *. And provided, further, That the General Assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business."

The constitution of the State of Texas contains the following provision: "Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll-tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mining and agricultural pursuits, shall never be required to pay an occupation tax."

The constitution of the State of Tennessee provides: "All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they from time to time direct."

The constitution of the State of Utah provides as follows: "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money * * *. Nothing in this constitution shall be construed to prevent the legislature from providing a stamp tax, or a tax based on income, occupation, licenses, franchises, or mortgages."

The constitution of the State of Virginia provides as follows: "All property, except as hereinafter provided, shall be

taxed, all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws * * *. The General Assembly may levy a tax upon incomes in excess of $600 per annum; may levy a license tax upon any business which cannot be reached by the ad valorem system."

The constitution of the State of West Virginia contains the following provision: "Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law * * *. The legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations."

The constitution of the State of Kentucky contains the following provisions: "Taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws. All property shall be assessed at its fair cash value. All property, whether owned by natural persons or corporations shall be taxed in proportion to its value * * *. The General Assembly may by general laws only provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

The organic act of the Territory of Oklahoma provides as follows: "Nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value: Provided, That nothing herein shall be held to prohibit the levying and collecting license or special taxes in the territory from persons engaged in any business therein, if the legislative power shall consider such taxes necessary."

It will be observed that the constitution of each of the States above referred to contain express provisions authorizing the collection of license taxes. The language employed varies, but in each case it is clear that the framers of the constitutions intended to authorize the legislature to impose and collect license taxes for the purpose of revenue as distinguished from license fees exacted in connection with the requirement of a license for the purpose of regulation. It is needless to say that the courts in the States above mentioned have uniformly held that the legislature had the power to raise revenue by means of a license tax. Even in the States mentioned, however, it has been quite generally held that license taxes must be uniform upon the same class of subjects.

While the decisions of the courts under constitutions containing express provisions authorizing the enactment of laws requiring license taxes can have no application to a case arising under the organic act of Alaska, where no such provision exists, it is a noteworthy fact that the framers of these constitutions deemed it necessary to insert these express provisions in order to reserve the right to collect revenue by means of license taxes. Obviously they took the position that the insertion of the provisions with reference to uniformity and assessment according to value would destroy the right to collect license taxes unless that right was expressly reserved. No other reason can be assigned for the action taken.

A consideration of the Oklahoma organic act discloses the fact that Congress also took the view that unless the right to collect revenue by means of license taxes was expressly reserved, that right would be destroyed by the insertion in the organic act of a provision requiring uniformity and assessment according to value. Had it been the intention of Congress to permit the Alaska Legislature to raise revenue by means of license taxes it would have taken the same action that it took in the case of Oklahoma and reserved that right by a similar provision.

The constitutional provisions in any wise similar to the provision in the organic act of Alaska, found in the various State constitutions, and unaccompanied by other express provisions limiting their effect so as to have no application to license taxes or providing in express terms for the imposition of license taxes, will next be considered together with the decisions of the State courts thereunder:

The constitution of the State of California contains the following provisions:

> "All property in the State not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, franchises and all other matters and things, real, personal and mixed, capable of private ownership."
>
> "The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations or upon the inhabitants or property thereof for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The constitution also expressly provides that income taxes may be assessed and collected.

The provisions of the constitution of California first above quoted are not only expressly limited in their application to property taxes, but the meaning of the word "property" as therein used is expressly defined.

Under the decisions of the State courts generally, which differ in that regard from the decision rendered by the Supreme Court of the United States in the case of Welton *vs.* State, 91 U. S., 278, license taxes are not regarded as taxes upon property. They are regarded as taxes upon occupations, and these occupations are in turn regarded as intangible things separate and distinct from the property used

in pursuing such occupations. Viewing license taxes in this light, constitutional provisions which are expressly limited in their application to property taxes, such as is the provision in the California constitution above quoted, can have no application to license taxes, since these are not regarded as taxes upon property. There is then in the California constitution no provision to which license taxes must conform. The decisions under that section of the constitution prohibiting the imposition of taxes on counties, cities, etc., however, shed light upon the meaning of the words "all taxes" as employed in the organic act of Alaska.

The legislature of the State of California had passed a law requiring those engaged in certain kinds of businesses to take out a license and pay therefor fixed sums which were to be turned into the county treasury. This law was before the Supreme Court of California in the case of People *vs.* Martin, 60 Cal., 153. Its validity was assailed on the ground that the legislature had no power under the constitution to collect taxes for county purposes. It was contended that the license tax imposed was not a tax within the meaning of the constitution. It will be observed that the constitutional provision is not limited in its application to property taxes in that the taxes prohibited are those "upon the inhabitants or property thereof." This clause in the constitution, the Supreme Court of California held included not only property taxes, but also license taxes which were taxes upon the inhabitants. This act was held void. In passing upon this matter, Judge Ross, who was then a member of the Supreme Court of California, speaking for that court, says:

> "The important question in the case is, whether or not the word 'taxes' as used in this section of the constitution includes license taxes: for, if it does, the provisions of the Political Code imposing and providing for the collection of the license tax here in question, are clearly inconsistent with this sec-

tion of the constitution, and therefore inoperative by virtue of Section 1 of Article XXII of the same instrument.

"That the license fees imposed by the provisions of the Political Code were so imposed mainly, if not solely, for the purpose of revenue, does not admit of doubt; and where that is the case, they are, in effect, taxes. (Cooley on taxation, pages 396-7; 2 Dillon on Mun. Corp. Sec. 768.) Indeed, the statute itself designates the charge as a license tax. (Political Code, Sec. 3,359.)

"But are they 'taxes' within the meaning of Section 12 of Article XI, of the Constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon property; for by its express language the legislature is prohibited from imposing taxes upon the inhabitants of counties, cities, towns, or other public or municipal corporations, as well as upon their property, for county, city, town, or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for as already observed, the statute authorizing it, required the tax when collected to be paid into the county treasury for the use of the county general fund. The power to impose such taxes for such purposes, in our opinion, nó longer remains with the legislature;"

This decision is especially applicable to the present case in that it clearly shows the reason why some of the provisions in the various State constitutions are not applicable to license taxes. These provisions are limited to taxes on property by their express terms just as is the first provision above quoted from the California constitution. But the provision before the court in this case was not so limited but applied to taxes on the inhabitants and taxes on the property alike, which made it in all respects similar to the provision in the Alaska Organic Act, which is applicable by its terms to "all taxes" without regard to their character.

One of the judges then a member of the Supreme Court of California dissented, taking the same view that the learned trial court took in this case, that license taxes were to be distinguished from other taxes in some manner and were not to be regarded as included within constitutional provisions relating to taxes, a view that resulted from confusing license taxes exacted under the taxing power with license fees exacted under the police power.

The Supreme Court of California in rendering subsequent decisions, however, adopted the views expressed by Judge Ross and concurred in by the majority of the court as law. See Ex Parte Schuler 139 Pac. 985. And the Supreme Court of Missouri in construing a constitutional provision containing the same language, as will be pointed out when the provisions of the constitution of that State are discussed, adopted the same construction.

The constitution of the State of Colorado provides as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for the taxation of all property real and personal."

Under this constitutional provision it has been held in Colorado that a license tax can be laid and collected. It will be observed that the constitutional provision contains the following "which shall prescribe such regulations as shall secure a just valuation for the taxation of all property real and personal." This provision of course by its terms is applicable only to property taxes.

The constitution of the State of Delaware provides as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The effect of this constitutional provision does not seem to have been passed upon by the Supreme Court of Delaware in so far as it affects license taxes.

The constitution of the State of Georgia provides as follows:

> "All taxes shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

It will be observed that under this constitutional provision all taxes, without regard to their character, are required to be uniform upon the same class of subjects. It is accordingly held by the Supreme Court of Georgia that license taxes must conform to this provision. It will be further observed that the requirement that taxes shall *ad valorem* is expressly limited to property taxes. Under this constitutional provision therefor licenses taxes are excepted from the provision that taxes must be according to value. This constitutional provision therefore permits the levying of licenses taxes, though such taxes are not levied according to value or *ad valorem* provided they are uniform upon the same class of subjects, and this has been the construction placed upon the provision by the Supreme Court of Georgia.

The Supreme Court of Georgia, however, went somewhat further and held that where a license tax on merchants was graduated in proportion to the volume of business transacted, the tax should be according to value, notwithstanding the fact that the constitutional provision requiring taxes to be *ad valorem* was limited expressly to property taxes. The court says: "It is true that the clause cited in words applies to property, but in sense and spirit we think it covers a business tax scaled by the amount or value of the business transacted." Johnson *vs.* Macon, 62 Ga., 645. In this case it was further held that a license tax law graded in proportion to the amount or value of business transacted as above indi-

cated was not sufficiently uniform upon the same class of subjects.

The constitution of the State of Indiana provides as follows:

> "That the general assembly shall provide by law for a uniform and equal rate of assessment and taxation and shall provide such regulations as shall secure a just valuation for taxation of all property both real and personal."

The provisions of this constitution it would seem are clearly limited so as to apply to property taxes only. Nevertheless the Supreme Court of Indiana in the case of Henderson *vs.* London & Lancashire Ins. Company, 135 Ind., 24, held that a tax on the business of such foreign insurance companies as were doing business in counties having cities with paid fire departments, which tax was to create a fireman's fund, violated the constitutional provision requiring equality and uniformity of taxation, as it applied only to a portion of the class of foreign insurance companies, and the power of the whole State was thus exercised on a portion of the class for the benefit of a small part of the citizens of a few cities of the State. This decision indicates the tendency of the State. This decision indicates the tendency of the courts to apply the constitutional provisions of this character to license taxes wherever possible.

The constitution of the State of Kansas provides as follows:

> "The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for State, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family shall be exempted from taxation."

This constitutional provision by its terms deals with taxation of property only and accordingly the Supreme Court of Kansas held that it did not apply to license taxes.

The constitution of the State of Maine contains the following provision:

> "All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just valuation thereof."

This provision, like that contained in the Indiana constitution, is by its terms limited in its application to taxes on real and personal estate and does not therefore apply to licenses taxes.

The constitution of the State of Minnesota provides as follows:

> "All taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the State * * *. Laws shall be passed taxing all moneys, credits, investments, in bonds, stocks, joint-stock companies or otherwise, and also all real and personal property, according to its true value in money."

It will be noted that the provision in this constitution requiring equality applies to all taxes alike, but that the remaining provisions requiring levies to be made according to cash valuation, and taxes to be assessed according to value are expressly limited in their application by the terms of the provision to property taxes. It was accordingly held by the Supreme Court of Minnesota that all license taxes must be uniform, and further that all taxes upon property must be assessed according to value. Willis *vs.* Standard Oil Co., 52 N. W., 652-4; *In re* Tax Delinquency in St. Louis County, 75 N. W., 970; Minces *vs.* Schœnig, 75 N. W., 711.

In the case of Willis *vs.* Standard Oil Company, the Supreme Court of Minnesota was called upon to pass on the validity of a law providing for the payment of a fee to in-

spectors of oils. All oils shipped in and used for illuminating purposes were required to be inspected and the inspector was, for such inspection, entitled to certain fees. The objection was made that the fees exacted were exacted for the purpose of revenue and that the measure was in fact a measure designed to raise revenue. The court held if that were the object of the measure it could not be sustained under the constitutional provision. The court says: "It is also objected that the act is one levying a tax, and not a police regulation. Of course, under the constitutional provision requiring taxes to be as nearly equal as may be, and to be levied on a cash valuation, the law could not be sustained as a tax law. It can only be upheld as an exercise of the police power of the State."

In the case of *In re* Tax Delinquency in St. Louis County, the Supreme Court of Minnesota passed upon a law providing that mining companies might pay in the State treasury annually, in lieu of all taxes or assessments upon capital stock, personal and real estate, of such companies in or upon which real estate such business of mining might be carried on, or which was connected therewith, and set apart for such business the following amounts, to wit: For each ton of copper, fifty cents, and for each ton of iron ore mined, shipped or disposed of, one cent. The court held that under the Minnesota constitution the act was void, and in passing upon the matter they say: "It would be difficult to conceive of a system of taxation more obnoxious to the constitution."

In the case of Minces *vs.* Schœnig, the court had before it an ordinance passed by the City of Winona which contained the provision that those who conducted bankrupt sales were to obtain a license and in addition to the payment of a fee, justified under the police power, were required to pay a tax of two per cent of the amount of the gross receipts. In holding this ordinance void, the court say: "This mode of taxing is so palpably in conflict with section 1, article 9 of the constitution, which requires that all property on which

taxes are to be levied shall have a cash valuation, that it cannot stand for a moment. The legislature itself has not power to adopt any such system of taxation, or to grant authority to a municipality to do so."

The constitution of the State of Michigan contains the following provisions:

> "The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law * * *. All assessments hereafter authorized shall be on property at its cash value.
>
> "The legislature shall provide for an equalization of a State board in the year 1851, and every fifth year thereafter, of assessments on all taxable property except that paying specific taxes."

The Supreme Court of Michigan held that the term "specific tax" used in the constitutional provision embraced license taxes, a license tax being of course a specific tax on business.

Under the constitution of the State of Massachusetts the legislature is empowered

> "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities, whatsoever, brought into, produced, manufactured, or being within the same."

The effect of this constitutional provision was before the Supreme Court of Massachusetts in the case of Portland Bank *vs.* Apthorp, 12 Mass., 252-256. The legislature had

enacted a law taxing banks one-half of one per cent on the amount of their capital stock. In discussing the validity of this law in the light of the constitutional provision, the Supreme Court of Massachusetts hold that the tax could not be justified under the first part of the provision and in that connection the court say: "Under the first branch of this power, namely, that of imposing and levying rates and taxes, the requisition upon the banks cannot be justified; for those taxes must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the constitution."

It will be observed from the language quoted that the assessment of a license tax would be considered as prohibited under the constitutional provision if the first portion of the provision alone were considered, yet this portion of the constitution of Massachusetts does not as clearly and definitely apply to all taxes alike as does the provision in the Alaska organic law.

The tax in question was, however, upheld by the Supreme Court of Massachusetts on the ground that the subsequent portion of the provision in the Massachusetts constitution allowed the collection of excises on commodities. The term "commodity" was given a broad meaning, so broad indeed as to include everything on which a tax could be laid. The court justified its action in so construing the word "commodity" on the ground that the legislature had always so construed it since the adoption of the constitution itself thirty years ago. This was considered by the court as being sufficient evidence to show that the framers of the constitu-

tion must have intended to give this meaning to the word "commodity."

The constitution of the State of Mississippi provides as follows:

> "Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value * * *. Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

It will be noted that the provision requiring uniformity and equality applies to taxes generally, while the remaining provisions are limited by their terms to property taxes.

The constitution of the State of New Hampshire gives the General Court power

> "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within, the said State, and upon all estates within the same."

Under this provision of course a license tax can be imposed as, "it is a tax," as the Supreme Court of California held in the case of People *vs.* Martin, "upon the inhabitants." Nevertheless the Supreme Court of New Hampshire held that these taxes must be uniform. State *vs.* Pennoyer, 65 N. H., 113; 18 Atl., 878. In this case the Supreme Court of New Hampshire had before it a law requiring physicians to procure a license and pay a stipulated amount therefor. The law did not apply alike to all physicians and was accordingly held void as lacking in uniformity.

The constitution of the State of Missouri contains the following provisions:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general laws.

"All property subject to taxation shall be taxed in proportion to its value.

"The General Assembly shall not impose taxes upon counties, cities, towns, or other municipal corporations or upon the inhabitants thereof or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities the power to collect and assess taxes for such purposes."

It will be noted that this constitution, like practically all the other constitutions, and unlike the Alaska organic act, contains two separate provisions, one applying to taxes generally and the other to property taxes only. It is similar to the Alaska organic act in that all taxes are required to be uniform upon the same class of subjects. It differs from the Alaska organic act in that under it all property subject to taxation shall be taxed in proportion to its value, while under the Alaska provision "all" taxes must be assessed according to the value of the thing which is the subject of taxation. This constitutional provision is construed by the courts so as to carry out the meaning so clearly expressed and license taxes are included within the provision, where taxes generally are referred to and are required to be uniform upon the same class of subjects.

In the Case of City of St. Louis *vs.* Spiegel, 2 S. W., 839, it was held that license taxes must under the Missouri constitution be uniform upon the same class of subjects. An ordinance had been passed by the city of St. Louis providing for a license tax of $25 on meat shops situate in one part of the city and $50 on meat shops situate in another part of the city. It was held that this license tax violated the constitutional provision requiring uniformity.

The constitutional provision providing that the legislature shall not tax counties, cities, etc., or the inhabitants or property thereof, for county, city, town or other municipal purposes, is in all respects like the provision upon that subject contained in the California constitution, and the Su-

preme Court of Missouri placed thereon the same construction previously placed on a similar provision by the Supreme Court of California. State *ex rel.* Wyatt *vs.* Ashbrook, 72 Am. St. Rep., 765.

It was claimed in this case that an act of the Missouri legislature requiring a license tax from department stores was void for two reasons. First, that the legislature had no power to pass the law since two-thirds of the revenue derived under it was paid into the city treasury, the law being therefore designed to raise revenue for municipal purposes and being imposed upon the inhabitants of the cities. And for the further reason that it lacked uniformity in that it applied only to department stores. The Supreme Court of Missouri held that the act violated the constitution in both respects. This decision, like the decision by the Supreme Court of California, is important in that it is held that the term "tax" when used in the constitution includes license taxes unless it is expressly restricted to property taxes. As in California the tax therein prohibited was any tax on the inhabitants or property. In Alaska the term used is "all taxes" which is equally comprehensive.

The constitution of the State of Nevada provides as follows:

> "The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory."

This provision by its terms requires no more than a just valuation for taxation of all property, real, personal, and possessory, and has of course no application to license taxes.

The constitution of the State of New Jersey provides as follows:

> "Property shall be assessed for taxation under general laws and by uniform rules according to its true value."

This provision also is limited in its application to the taxation of property.

The constitution of North Dakota provides as follows:

> "Laws shall be passed taxing by uniform rule all property according to its true value in money."

The terms of this provision also expressly apply to the taxation of property only.

The constitution of the State of Ohio provides as follows:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money;"

It will be observed that the provisions in the Ohio constitution are such that they apparently relate to property taxes only, yet the Ohio courts have persistently justified non-uniformity in connection with money exactions for licenses on the ground that they were exacted under the police power, indicating thereby that exactions under the taxing power would be required to be uniform.

The Ohio decisions are reviewed in the opinion in the case of Pittsburg, C. & St. L. R. R. Co. *vs.* State, 30 N. E., 435. An act passed by the Ohio legislature required every corporation or company operating a railroad or any part of a railroad within the State to pay to the Commissioner of Railroads and Telegraphs a fee of $1.00 per mile for each mile of track operated by it within the State. The constitutionality of this act was assailed on the ground that it levied a specific tax on property. It was contended that the money sought to be collected was a fee and not a tax and did not come within the constitutional inhibition. In support of this contention it was urged that the Supreme Court of Ohio in a previous decision had held that a license fee

exacted from gas companies did not come within the constitutional inhibition requiring uniformity. The Supreme Court of Ohio reviewed this early decision indicating that the gas business was a business that required police supervision; that the law imposing the exaction upon the gas companies provided for numerous kinds of regulation and that the license fee required from the gas companies was required in order to pay the cost of this regulation under the police power. It was further shown that the decision of the court in that case was based upon that ground and the law sustained as an exercise of the police power. The court then proceeded to apply this theory of the law to the facts in the case. It was pointed out that the law under consideration did not provide for any regulation and that the exaction of $1.00 per mile was a tax pure and simple and that its nature as a tax was not affected by the fact that it was called a fee. The court say: "A tax is a pecuniary burden imposed for the support of the government * * *. Burdens or charges imposed by the legislative power of a State upon persons or property to raise money for public purposes. The money raised by this section under consideration is directed to be paid into the State treasury; it becomes a part of the funds of the State applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the act to which it is supplementary, to indicate a purpose that the fund raised shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the State. A law like this—the direct and only purpose it can accomplish being to create a fund by an exaction on property to be paid into the State treasury to be used indiscriminately for any and all public purposes—must be regarded as creating a tax. It bears no resemblance to, and should not be confounded with, that class of laws enacted by the legislature, the immediate object of which is to call into active operation the police powers

of the State, but which, incidentally or indirectly, may cause the production of public revenue."

The constitution of the State of Oregon provides as follows:

> "No tax duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxes shall be equal and uniform.
>
> "The Legislative Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal * * *."

It will be observed that the only provision in the Oregon constitution that applies to all taxes is the provision requiring equality and uniformity. The other provisions are expressly limited in their application to taxation of property, real and personal. All that would be required of a license tax under this provision is equality and uniformity. Taxes on property, however, both real and personal are required to be in accordance with a just valuation.

In deciding the case of Ellis *vs.* Frazier, 63 Pac., 642, the Supreme Court of Oregon was called upon to pass on the validity of a tax under the Oregon constitution. A law had been passed by the Oregon legislature requiring the owners of bicycles to pay a tax of $1.25, whereupon they were furnished with a tag indicating that the tax had been paid, which was to be attached to the bicycle for and on account of which it had been collected. It was contended that this was an exaction that did not come within the constitutional inhibition. But the court held it was a tax and that for that reason it was void as lacking uniformity since bicycle owners in certain counties only were required to pay it. And furthermore that it was a property tax and for that reason violated the constitutional inhibition that property taxes must be ad valorem or assessed according to value. In

passing upon this question the Supreme Court of Oregon say: "As a preliminary matter, it is important to consider whether the burden thus imposed upon bicycle owners is a tax or a license; for, if the latter, it is not inhibited by the provisions of the organic act relied upon, the courts generally holding that the constitutional requirement as to uniformity of taxation has no reference to the taxation of occupations." (It must be noted that the Supreme Court of Oregon used the term "license" and the term "occupation tax" interchangeably as referring to exactions under the police power and not to exactions under the taxing power; that what is usually spoken of as a license tax is not included within the meaning of either of the terms as used by the Oregon Supreme Court. This is evident from the context.) Continuing the court say: "The legislative assembly has referred to the levy as a tax, but the descriptive designation is unimportant; for the object sought to be attained by the enactment must determine the character of the exaction. 'The distinction between a demand of money, under the police power, and one made under the power to tax,' says Judge Cooley, 'is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power.' Cooley, Tax'n, 396. It was held, in the case of *In re* Wan Yin (D. C.), 22 Fed., 701, that whenever it is manifest that the fee for a license to conduct an occupation is substantially in excess of the sum necessary to cover the cost of issuing the license and the incidental expense attending the regulation of the business, the burden is a tax, and not a license." The court then proceeded to review other similar cases and continuing say: "Whatever the rule may be in respect to the granting of licenses which

incidentally result in producing a revenue, or the law in relation to the authority of a municipal corporation in the maintenance of its streets, it cannot reasonably be inferred that the burden imposed by the act in question was an exercise of the police power of the State; for the use of a bicycle does not necessarily tend to the destruction of the highways. We do not wish to be understood as intimating that the sum of one dollar more than the cost of executing the necessary receipts and supplying the requisite tags is an unreasonable exaction, but, inasmuch as that sum is set apart from each collection as a fund for the purpose of constructing and maintaining bicycle paths, it is evident, we think, from a consideration of the entire act, that it was primarily designed as a means of raising revenue, and the burden thus imposed must therefore be treated as a tax, and not a license." It was then held that since bicycles differ greatly in value, the tax violated the provision requiring uniformity and equality. The court say: "The value of all bicycles not being the same, the tax of $1.25 upon each destroys the required uniformity in the assessment, and renders the rate of taxation unequal, so that the tax in this respect violates the constitutional provision above quoted." As has been elsewhere shown in this brief the act was also held to violate the constitutional provision that property must be taxed according to value, the court holding that this tax was in fact a tax on the property itself.

Later on the Supreme Court of Oregon had occasion to pass upon an act of the legislature more or less similar in character, Reser *vs.* Umatilla County, 86 Pac., 595. In this case the court had before it an act which required the nonresident owners of sheep bringing sheep into the State for pasturage or for the purpose of driving such sheep through the State, to pay a tax of a fixed sum per head. It was urged by the Attorney General that the exaction was made under the police power of the State and was not therefore subject

to the limitations imposed by the constitution with reference to the collection of taxes. But the court held the exaction to be a tax and held the tax void as lacking in uniformity and as having been levied without regard to valuation. In the course of the opinion it is said: "It is sometimes difficult to distinguish between a tax and a license. Generally speaking, a tax is a charge or burden imposed on persons or property for the support of the Government or for some specific purpose authorized by it. Its object is to raise revenue. A license, however, is a permission to do what would otherwise be unlawful. The fee or charge often exacted therefor is in law supposed to cover the cost of issuing the license and the expense incident to regulating and controlling the business, although it may ultimately result in a source of revenue. To relieve a law, imposing a burden or tax upon persons or property, from the operation of the constitutional provision relative to taxation, it must have for its primary object the granting of some privilege or the imposing of some restraint."

It will be noted that in each of these cases the law before the court levied a specific tax on property. Such taxes in common with all other taxes were required by the constitution to be equal and uniform, since the clause requiring equality and uniformity applied to all taxes alike and being property taxes they were required to be assessed according to value, since by the provisions of the constitution property taxes are required to be so assessed. However, since the constitutional provision requiring assessment according to value is expressly limited in its application to property taxes, there would seem to be no good reason why a license tax could not be collected in Oregon if such tax were equal and uniform unless the view were adopted expressed by the Supreme Court of the United States in the case of Welton *vs.* State that these taxes on business were in effect a tax on the property employed in connection with such business. The Supreme Court of Oregon seems to have taken this view of the

matter, for while the taxes before the court were not license taxes, but specific property taxes, the opinion in each case contains a discussion of the validity of specific taxes generally including license taxes and leads to the conclusion that under the Oregon constitution no money can be exacted except in the form of *ad valorem* property taxes unless the exaction be made in the exercise of the police power of the State.

The constitution of the State of Pennsylvania provides:

> "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

This constitution contains no provision requiring assessment according to value, the only provision contained being one requiring uniformity upon the same class of subjects and this, like the provision in the Alaska organic act, applies to all taxes alike. Accordingly it is held by the Supreme Court of Pennsylvania that occupation or license taxes come within its requirements and must be uniform. Banger's Appeal 109 Pa., St. 79.

In this case the court had before it an ordinance of the city of Williamsport under which it was sought to collect an occupation tax, the amount of which was in each case determined by the income of the person taxed. The ordinance was held to be invalid on two grounds: First, that the tax was in fact the income tax and that while the city of Williamsport had authority to levy occupation taxes, it had no authority to levy income taxes. Second, that the constitution of the State required all taxes to be uniform upon the same class of subjects; that the tax in question, regardless of its character, was not uniform upon the same class of subjects and was therefore void as failing to comply with this constitutional requirement. The court discussed

at some length the manner in which occupation taxes could be levied so as to comply with the constitutional requirement of uniformity and the reason why the tax before the court did not answer this requirement. In referring to the opinion expressed by the lower court to the effect that the tax complied with the requirement of uniformity, the Supreme Court say: "These views of the learned court are well enough as far as they go, but they do not come to the proper standard of uniformity. However, they might have been regarded prior to the adoption of the present constitution. They do not conform to the requirements of the organic law as it exists at the present time. That requires not merely that there shall be no exemption of persons or classes, but that upon persons and classes the tax shall be uniform."

The constitution of the State of South Dakota provides as follows:

> "All taxation shall be equal and uniform. All taxes to be raised in this State shall be uniform on all real and personal property, according to its value in money."

It will be observed that the constitution contains a uniformity clause that applies to all taxes alike, while the clause requiring taxation according to value is limited by its terms to taxes on real and personal property. It was accordingly held by the Supreme Court of South Dakota that since the clause requiring equality and uniformity applied to all taxation, license taxes must be equal and uniform. *In re* Watson 97 N. W., 465. In this case the court had before it a law requiring a license tax from peddlers, exempting peddlers of nursery stock and other classes of peddlers from its operation. It was contended that this tax lacked uniformity and was therefor obnoxious to the constitutional provisions requiring uniformity in the case of all taxation. On the

other hand it was argued that in some jurisdictions the uniformity clauses were not applied to license taxes. The Supreme Court of South Dakota, however, held that such contention could not be maintained under the provision of the constitution of that State, which did not expressly limit the requirement of uniformity to property taxes, but provided that all taxes must be uniform. In reference to this matter the court say:

"Such position cannot be taken in this State. The clause 'and all taxation shall be equal and uniform,' found in the Bill of Rights, cannot be ignored. Constitutions are supposed to be prepared with much care and deliberation. It will not do to assume that such important instruments contain any idle or meaningless phrases. On the contrary, it must be presumed that every word was advisedly selected, inserted for a purpose, and intended to have its due weight in determining what organic principles have been established. In this State, then, taxes on occupations must be equal and uniform."

The constitution of the State of Washington provides as follows:

> "all property in this State, not exempted under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

It will be observed that each and every provision contained in this constitution relative to taxation is expressly limited by its language to property taxes and can therefore have no

possible application to license taxes under the view taken by the State courts that those taxes are not taxes on property.

The constitution of the State of Wyoming provides as follows:

> "No tax shall be imposed without the consent of the people or their authorized representative. All taxation shall be equal and uniform * * *. All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

It will be observed that the constitutional requirement of equality and uniformity in Wyoming, as in South Dakota, applies to all taxation, while the provision requiring taxes to be assessed according to value is expressly limited to property taxes. There is therefore nothing in the constitution to prevent the exaction of license taxes provided they are equal and uniform.

In the case of State *vs.* Willingham, 9 Wyo., 290; 62 Pac., 797, a city ordinance was attacked on the ground that the license tax required was not uniform and was therefore in conflict with the constitution. The court reviewed the provisions of the ordinance and held that the tax imposed was in fact a uniform tax and satisfied the constitutional provision.

The constitution of the State of Wisconsin provides as follows:

> "The rule of taxation shall be uniform and taxes shall be levied upon all property as the legislature shall prescribe."

This constitutional provision is rather indefinite. Its effect was considered by the Supreme Court of Wisconsin in the following cases: Fire Department of Milwaukee *vs.* Holvanstein, 16 Wis., 136; Morrill *vs.* State, 38 Wis., 428; State *vs.* Whitcom, 122 Wis., 110; 99 N. W., 468.

In the case of Fire Department of Milwaukee *vs.* Halvanstein, the court passed upon the validity of a law requiring foreign insurance companies to pay a per cent of their premiums for the benefit of the fire departments of some of the cities. It was contended that this was a tax and void since it lacked uniformity. But the court held that the exaction was not a tax but a fee exacted by the State in the exercise of its police power and that the law was no more than a police regulation. The court say: "Nor is the requirement an exercise of the power of taxation as to the companies, but only a proper exercise of the police power inherent in the sovereignty of the State."

The decision in the case of Morill *vs.* State relates to the validity of an act of the state legislature requiring hawkers and peddlers to take out a license and pay a fee therefor. It was claimed that this was an exercise of the taxing power and that for that reason the fee must be uniform. The court however held that the legislature had the authority under the police power to prohibit hawking altogether, and had the undoubted power to regulate its exercise, because hawking and peddling were regarded as unsavory lines of business. It was accordingly held that the act in question was enacted under the police power for the purpose of regulation and was not governed by the constitutional inhibitions relating to taxation. After quoting from Jacob's Law Dictionary, where hawkers are defined as deceitful fellows, etc., and making the statement that it was not the intention to cast any reflection upon the parties before the court, in view of the fact that many honest men were in the business of peddling, the court say: "but with this disclaimer we must be permitted to add that undoubtedly resort is often had to this business for the sole purpose of obtaining admittance, which could not otherwise be obtained into private dwelling houses in furtherance of some criminal or unlawful object. This is another reason where the restriction or regulation of the business is an exercise of police power." This case was

afterwards appealed to the Supreme Court of the United States as reported in the 154 U. S., 626. The judgment of the Supreme Court of Wisconsin was reversed. The Supreme Court of the United States do not discuss the case in the opinion any further than to say it was reversed on the authority of Welton *vs.* State.

The decision in the case of State *vs.* Whitcom deals with the validity of an act passed by the Wisconsin legislature requiring peddlers to procure a license and pay a fee therefor. Veterans of the Civil War and a number of others were exempted from the operation of the act. The court referred to two former cases decided by it, which leave the question as to whether a license tax could be exacted under the provisions of the Wisconsin constitution in doubt, and in view of the fact that that matter had not been argued in this case and the further fact that an expression on it was not necessary to the decision, the court refused to pass on it.

It was held that it was immaterial whether the license fee required under this law were viewed as a tax or an exaction under the police power, as in either event the law would be void. If viewed as a tax it could not be sustained unless it was uniform upon the same class of subjects. If viewed as an exaction under the police power, it could not be sustained since it denied the equal protection of the laws, even though its object was to protect the public against irresponsible and deceitful traders. In the course of the opinion the court said: "In considering the exemptions on partially disabled veterans of the Civil War a quite unanswerable question arises, why, whether for purpose of taxation of police, they should be exempted any more than equally disabled veterans of other wars." And further on in the opinion it is said: "It seems neither necessary nor wise to carry further a critical analysis of this statute. We have pointed out several respects in which it fails to impose its penalties upon persons not distinguishable from the appellant by any legitimate classification. It therefore denies him the equal pro-

tection to which, both by Federal and State constitutions he is entitled, and cannot be valid as against him whether its purpose be taxation or regulation of conduct."

None of the other State constitutions contains a provision at all similar to the provision contained in the organic law of Alaska. A review of the various constitutional provisions limiting the power of taxation and the decisions thereunder discloses the fact that the courts have construed these provisions just as they were written. In many of the State constitutions the provision relating to uniformity is not by its terms limited to property taxes, but like the Alaska provision is so worded as to apply to all taxation alike, and wherever such is the case it will be observed that the courts have generally, if not universally, held that the provision related to all taxation regardless of the character of the tax and that license taxes in order to be valid must be uniform in compliance with the constitutional provision.

Respectfully submitted,

J. A. HELLENTHAL,
HARVEY M. FRIEND,
Counsel for Plaintiff in Error.

In the

Supreme Court of the United States

No. 387.

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

GEORGE B. GRIGSBY,
Attorney General for the
Territory of Alaska.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 387.

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

Now comes the Defendant in Error, the Territory of Alaska, by George B. Grigsby, Attorney General, and moves this court to dismiss the writ of error herein for want of jurisdiction.

This motion is based upon all the records and files herein, and upon the grounds stated in the annexed brief and argument.

GEORGE B. GRIGSBY,
Attorney General for the
Territory of Alaska.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 387

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

STATEMENT OF THE CASE.

This is an action originally brought by the Territory of Alaska to recover taxes claimed to be due from the plaintiff in error under an act of the Territorial Legislature of the Territory of Alaska. The case was brought originally in the United States District Court for the District of Alaska, First Division. Judgment was rendered in said court in favor of the Territory, and thereupon a writ of error was sued out to the Circuit Court of Appeals for the Ninth Circuit. The judgment of the lower court was affirmed by the Circuit

Court of Appeals. Thereafter a petition for a writ of certiorari was filed in the Supreme Court by the plaintiff in error, which has been denied. Subsequently and within the time allowed by law a writ of error was sued out to this court.

On the trial of the case in the lower court certain questions were raised which involved the construction or application of the Constitution of the United States and the constitutionality of the law of the Territorial Legislature imposing the tax sought to be recovered.

Defendant in error contends that the judgment of the Circuit Court of Appeals is final herein and that this court is therefore without jurisdiction.

BRIEF AND ARGUMENT.

The law defining the appellate jurisdiction of the Circuit Court of Appeals over cases arising in Alaska is set forth in section 134 of the Judicial Code of the United States (36 Stat. L. 1134) as follows:

> "Sec. 134. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed

five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals."

Section 247 of the Judicial Code (36 Stat. L. 1158) provides for the taking of appeals and writs of error from the District Courts of Alaska direct to the Supreme Court, as follows:

"Sec. 247. Appeals and writs of error may be taken and prosecuted from the final judgments and decrees of the district court for the district of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution

> or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs, of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the District Courts to the Supreme Court."

It is conceded that in this action a writ of error might have been taken direct to the Supreme Court from the judgment of the District Court of Alaska because of the constitutional questions raised by the demurrer of the plaintiff in error. Other questions, however, having arisen in the case than constitutional questions, the plaintiff in error elected to take its appeal to the Circuit Court of Appeals. The question now presented is: Was the judgment of the Circuit Court of Appeals final under the provisions of section 134 above quoted?

If no other than constitutional questions were raised in the court below the Supreme Court of the United States would undoubtedly have had exclusive appellate jurisdiction. There being other questions involved, however, the plaintiff in error had a right to elect to appeal either to the Circuit Court of Appeals or to the Supreme Court.

(*Bernarr McFadden vs. U. S.*, 53 *Law. Ed.* 801;

Amer. Sugar Ref. Co. vs. New Orleans, 181 *U. S.* 277; 45 *Law. Ed.* 859.)

Having elected to pursue the former course, is plaintiff in error bound by the judgment of the Circuit Court of Appeals, or may he sue out another writ of error to the Supreme Court?

The decisions construing section 128 of the Judicial Code (36 Stat. L. 1133), which defines the appellate jurisdiction of the Circuit Court of Appeals over the District Courts of the United States, throw much light upon the question. Section 128 is as follows:

> "Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

It has been repeatedly held by this court in

construing the above section that the judgment of the Circuit Court of Appeals is final in the class of cases enumerated, even though constitutional questions have arisen in the progress of the trial of a case which would have caused a writ of error to lie direct to the Supreme Court.

> "A judgment by the Circuit Court of Appeals in a case in which the jurisdiction of the District Court depended solely upon the fact that the case was one arising under the criminal laws of the United States is, by the very terms of the act of March 3, 1891, section 6, 'final' and is not reviewable in a Federal Supreme Court, although constitutional rights were invoked by the accused and the case might therefore, under section 5 of that act, have been brought directly from the district court to the Supreme Court."
>
> (*Bernarr McFadden vs. U. S.*, 53 *Law. Ed.* 801.)

Quoting from the decision above cited:

> "As this is a case arising under the criminal laws, the judgment of the circuit court of appeals, rendered within its lawful jurisdiction is, by the very terms of the act, final. And so it was held in Cary Mfg. Co. v. Acme Flexible Clasp Co., 187 U. S. 427, this court saying, through the chief justice: 'Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the

> denial of constitutional rights, and hence that this court has jurisdiction under section 5 of that act; but it is settled that, even if a party might be entitled to come directly to this court under that section, yet, if he does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court;' and the writ of error to the circuit court of appeals was accordingly dismissed."

See also Bagley vs. General Fire Extinguisher Co., 53 Law. Ed 605, to the following effect:

> "Jurisdiction below depends entirely upon diverse citizenship within the meaning of the act of March 3, 1891 (26 Stat. at L. 826), section 6, making judgments of the circuit courts of appeals final in such cases, where that is the only ground of jurisdiction disclosed by the complaint, although a Federal question may have been raised at the trial."

See also the following cases: Spencer v. Duplan Silk Co., 191 U. S. 526; Bankers' Mut. Casualty Co. vs. Minneapolis, St. P. & St. Ste M. R. Co., 192 U. S. 371.)

> "Other questions subsequently raised in a case in which the jurisdiction of the Federal circuit court depends, at the commencement of the action, upon the citizenship of the parties, cannot give appellate jurisdiction to the Supreme Court to review a judgment of the circuit court of appeals.
>
> (*Borgmeyer v. Idler*, 159 *U. S.* 408.)

It is apparent that in construing section 128, which defines the appellate jurisdiction over United States District Courts this court has uniformly held that in order for a constitutional question to prevent the judgment of the circuit court of appeals being final it must be such a question as wholly or partially vested the trial court with jurisdiction in the first place.

Undoubtedly the intent of the judiciary act of March 3, 1891, was that there should not be two appeals except where the decision of the circuit court of appeals is not made final, (Amer. Sugar Refining Co. vs. New Orleans, 181 U. S. 277); and the trend of the decisions is to prevent two appeals or successive appeals except where the statute clearly authorizes them.

> "It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals."
>
> (*Robinson v. Caldwell*, 41 *Law. Ed.* 745, 165 *U. S.* 359.)

The jurisdiction of the District Courts of Alaska is defined in section 363 Compiled Laws of Alaska, (35 Stat. L. 839), as follows:

> "There is hereby established a District Court for the District of Alaska with the jurisdiction of circuit and district courts

> of the United States and with general jurisdiction in civil, criminal, equity and admiralty causes," etc., etc.,

The jurisdiction of the lower court, then, in this case did not depend upon any of the jurisdictional facts which would have been necessary to entitle any one of the District Courts of the United States to jurisdiction in a similar case; and it must be conceded that in all cases above cited where the decision of the Circuit Court of Appeals has been held final this conclusion was arrived at on account of the provisions of section 128 of the Judicial Code, which expressly states that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states, also in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws and in all admiralty cases. In all such cases the judgment of the Circuit Court of Appeals is held to be final notwithstanding constitutional questions being involved which did not affect the jurisdiction of the court below. The cases are cited, however, to show the tendency of the court to prevent successive appeals, and no doubt this tendency will affect the judgment of this court in the construction to be placed upon

section 134 of the Judicial Code, which defines the appellate jurisdiction of the Circuit Court of Appeals in Alaska cases.

In suing out this writ of error, plaintiff in error relies upon section 241 of the Judicial Code of the United States (36 Stat. L. 1157) which is as follows:

> "Sec. 241. In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

Is or is not the judgment of the Circuit Court of Appeals in this case made final by the provisions of section 134 above quoted? If it is not, then the right to two appeals may exist in Alaska which would not exist in the same class of cases in the United States District Court in any one of the States. The case might be an ordinary civil suit between citizens of different States, or one arising under the patent, copyright or revenue laws, and provided it involved a constitutional question the judgment of the Circuit Court of Appeals would not be final but a further appeal would lie to the Supreme Court. We do not believe that section 134 should receive a construction which would bring about such a result if it is susceptible of any other construction.

The particular language of section 134 under discussion is

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States * * * writs of error and appeals shall lie from the District Court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases."

To take jurisdiction of this case this court must construe the above language to mean that in all cases in which a writ of error *might* have been taken to the Supreme Court the judgment of the Circuit Court of Appeals is not final. In other words, in any case in which a constitutional question arises, whether on the pleadings or during the course of the trial, an appeal or writ of error can be sued out to the Circuit Court of Appeals and again if the case is affirmed, to the United States Supreme Court.

We contend on the contrary, that the apparent intention of Congress was to prevent, rather than encourage, successive appeals, to limit rather than enlarge the appellate jurisdiction of the Supreme Court over cases from Alaska, and to make the judgment of the Circuit Court of Appeals final in all cases appealed to that court from the District of Alaska. We contend that the language "in all

cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States" should be construed simply as a limitation on the class of cases which may be taken to the Circuit Court of Appeals and that the statute having designated and limited the cases cognizable in the Circuit Court of Appeals the language "and the judgments, orders and decrees of said court shall be final in all such cases" should be construed to mean that the judgment of the Circuit Court of Appeals is final in all cases of the class so designated and limited which have been appealed to that court. This construction is both reasonable and in accord with the decisions above quoted, which manifest the intent of the judiciary act and tendency of this court to prevent successive and repeated appeals when not expressly and clearly allowed by the terms of the act.

Respectfully submitted,

GEORGE B. GRIGSBY,
Attorney General for the
Territory of Alaska.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 387

ALASKA PACIFIC FISHERIES,
a corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

NOTICE

To the Alaska Pacific Fisheries, a corporation, plaintiff in error, and to J. A. Hellenthal, its counsel.

You are hereby notified that the Territory of Alaska, the defendant in error herein, will submit to the Supreme Court of the United States, on Monday, the.....day of February, 1918, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, and that said

motion will be submitted upon all the records and files herein, and upon the foregoing statement of facts and brief and argument.

GEORGE B. GRIGSBY,
Attorney General for the
Territory of Alaska.

Service of the foregoing notice, motion, brief and argument is hereby accepted and acknowledged this ..... day of January, 1918.

.....
Counsel for plaintiff in error.

Office Supreme Court, U. S.
FILED
FEB 20 1918
JAMES D. MAHER,
CLERK.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. [redacted]117

ALASKA PACIFIC FISHERIES, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF ALASKA, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

J. A. HELLENTHAL,
HARVEY M. FRIEND,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 387.

ALASKA PACIFIC FISHERIES, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF ALASKA, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

Statement of Facts.

This action was brought to recover taxes claimed to be due under an act of the Territorial Legislature of Alaska. The validity of the act which forms the basis of the proceeding was drawn in question in the trial court, both by demurrer and by answer, and in each case it was pointed out that the

act violated the provisions of the Constitution of the United States and also those of the organic act of the Territory. Other questions which did not go to the validity of the act of the Territorial Legislature, but dealt with the defendant's liability thereunder were also raised. All of these questions were duly presented to the lower court for consideration and determination. (See demurrer, Record, page 4; answer, Record, page 6, and bill of exceptions, Record, page 27.)

Judgment was entered by the court upon the pleadings to the agreed statement of facts for the sum of $1,900.00, exclusive of costs.

The case was thereupon taken to the Circuit Court of Appeals for the Ninth Circuit upon writ of error, where all the questions presented to the lower court were again presented for consideration and determination.

The judgment of the district court for Alaska was affirmed by the honorable Circuit Court of Appeals for the Ninth Circuit, and the various questions presented were decided against the plaintiff in error. (See opinion, Record, page 26, and opinion in the case of the *Alaska Mexican Gold Mining Company vs. Territory of Alaska,* 236 Fed., 64.) The last-mentioned case and the case at bar were argued and submitted together, and presented identical questions. Some of these were discussed by the Circuit Court of Appeals in the opinion in each case, but not repeated in both cases.

Whereupon the cause was taken to this court on writ of error.

The motion filed on behalf of the Territory presents the question as to whether or not this court has jurisdiction on writ of error to review the judgment of the Circuit Court of Appeals for the Ninth Circuit.

ARGUMENT.

Section 241 of the Judicial Code provides as follows:

> "In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

Since the case involves an amount in excess of one thousand dollars ($1,000), exclusive of costs, the only question open for discussion is whether or not the judgment of the Circuit Court of Appeals is made final by the terms of the Judicial Code.

Section 247 of the Judicial Code provides as follows:

> "Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska, or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize causes; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district courts to the Supreme Court."

Section 134 of the Judicial Code provides as follows:

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred

> and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals."

Since this case is one which involves the construction and application of the Constitution of the United States, it belongs to the class of cases mentioned in section 247 of the Judicial Code, in which appeals and writs of error may be taken from the district court of Alaska direct to the Supreme Court of the United States. If the case had been one involving no questions other than those which required the construction and application of the Constitution of the United States, this court would have had exclusive jurisdiction to review the judgment of the district court for Alaska, and the Circuit Court of Appeals would have had no jurisdiction in this regard; but the case was one which involved a number of other questions along with those involving the construction and application of the Constitution of the United States, so that under the authority of the case of *Spreckles Sugar Refining Company vs. McClain*, 192 U. S., 397, and other cases decided by this court, an appeal or writ of error might be taken out either to this court or to the Circuit Court of Appeals for the Ninth Circuit. The cause having been taken to the Circuit Court of Appeals, and there decided, it remains to be seen whether this court has jurisdiction to review it on writ of error direct to the Circuit Court of Appeals.

Section 134 of the Judicial Code provides that:

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases writs of error and appeals shall lie from the district court for Alaska, or from any division thereof, to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders, and decrees of said court shall be final in all such cases."

Under the terms of this act, therefore, the decision of the Circuit Court of Appeals is final in all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in section 247. But since this is a case in which a writ of error would lie to the Supreme Court of the United States, under the provisions of section 247, it is expressly excepted by the terms of the act from those cases in which the decision of the Circuit Court of Appeals is made final. The phrase "such cases" refers only to those cases dealt with by that section, and from this class those involving the construction and application of the Constitution of the United States are expressly excepted. The language of the act is not that the decisions of the Circuit Court of Appeals for the Ninth Circuit shall be final in "all cases" but in "such cases." The use of this word "such" limits the class of cases in which the decisions of the Circuit Court of Appeals are made final to the cases previously in the same sentence dealt with; and since the cases of the character dealt with in section 247, to which the case at bar belongs, are expressly excepted from those in which the decision is made final, the decision of the case at bar is not made final.

If it had been the intention of Congress that all decisions of the Circuit Court of Appeals should be final the language employed would have been to the effect that the orders, judgments, and decrees of such court should be final in all cases.

By employing the phrase "in all such cases," it is clear the Congress intended to limit the class of cases in which the orders, judgments, and decrees should be final to those previously designated, from which cases involving the construction or application of the Constitution of the United States were expressly excluded. And this is in accord with the settled rule of Congress upon that subject.

It has always been the policy of Congress to leave matters relating to the construction or application of the Constitution of the United States to this court. If the decisions of two separate courts were made final upon matters requiring the construction or application of the Constitution of the United States, two separate lines of decision would soon arise with reference to the effect of that instrument. The Constitution would ere long mean one thing in one court and another thing in another. Owing to the peculiar fitness of this court as the highest tribunal in the land, to pass upon all matters relating to the construction and application of the national Constitution, it has been the settled policy of Congress to leave such matters in all cases to the final judgment of this court. The decision of the Circuit Court of Appeals is not made final, and, the requisite amount being involved, it may be reviewed by this court under the provisions of section 241 of the Judicial Code.

American Sugar Refining Company vs. New Orleans, 181 U. S., 397.

Spreckles Sugar Refining Company vs. McClain, 192 U. S., 397.

Christianson vs. King County, 239 U. S., 356.

The case of *Macfadden vs. United States*, 213 U. S., 288, cited by the attorney general for the Territory, is not in point. That case originated in the district court of the United States, and arose under the criminal laws of the United States. In such cases the question of whether the judgment of the Circuit Court of Appeals is final depends

upon the source of jurisdiction, and is not determined by the nature of the case or the questions of law raised. In that case the source of jurisdiction was the criminal laws under which the case arose, and by the express language of section 128 of the Judicial Code the decisions of the Circuit Court of Appeals in all cases arising under the criminal laws are made final. The question in such cases is not what is the character of the questions involved, but what is the source of jurisdiction, and, under the express language of the statute in cases where the source of jurisdiction is the criminal laws, the decisions are made final, independent of the former question of what questions may or may not have been raised at the trial. Even though a case were presented, therefore, that might have gone directly to the Supreme Court from the district court because it involved the construction and application of the Constitution, the decision of the Circuit Court of Appeals would be final if the case arose under the criminal laws, for the language of the statute is explicit that in cases where the source of jurisdiction is the criminal laws, the decision of the Circuit Court of Appeals is final, regardless of the character of the questions that may be involved. As was said by the court in the opinion (p. 294):

> "It is to be observed that the line of division between cases appealable directly to this court and those appealable to the Circuit Court of Appeals, made by section 5 of the act, is based upon the nature of the case or of the questions of law raised; but the line of division between cases appealable from the Circuit Court of Appeals to this court and those not so appealable, drawn by section 6, is different, and is determined, not by the nature of the case or the questions of law raised, but by the sources of jurisdiction of the trial court, namely, the circuit court or the district court, whether the jurisdiction rests upon the character of the parties or the nature of the case."

It was for this reason that the *Macfadden case* was clearly distinguishable from the case of the *Spreckles Sugar Refin-*

ing Company vs. McClain, supra; for while in the last-mentioned case the revenue laws were one of the sources of jurisdiction, another source of jurisdiction was found in the fact that the plaintiff based his claim on the contention that the act under which the money sought to be recovered had been paid was unconstitutional. The last-mentioned contention, therefore, formed one of the sources of jurisdiction, and it was held that the writ of error could be maintained, as the jurisdiction of the trial court did not depend solely upon grounds which by the terms of the act would have made the judgment of the Circuit Court of Appeals final, but also depended upon grounds which would have permitted a writ of error from this court to the Circuit Court of Appeals.

The case was also different from the *Macfadden case* in that the constitutional questions raised in that case were raised in the course of the trial and were not such as to serve as a source of jurisdiction.

The provisions of section 247 and of section 134 of the Judicial Code, governing appeals and writs of error from the district court of Alaska, differ widely from the sections of the Judicial Code applicable to the *Macfadden case* and the case of the *Spreckles Sugar Refining Company vs. McClain, supra,* in that the finality of judgments of the Circuit Court of Appeals is not made to depend upon the sources of jurisdiction, but upon the character of the case. The district court of Alaska is a court of general law and equity jurisdiction and its judgments are reviewable without regard to the question of how the case arose. See *In re Cooper, petitioner,* 143 U. S., 472.

Accordingly, under the provisions of section 134 of the Judicial Code, the question of what judgments of the Circuit Court of Appeals are final is not determined by the source or origin of the jurisdiction, but by the character of the questions involved, and it is expressly provided that the cases of the character dealt with by section 247, which include those involving the construction or application of the Constitution

of the United States, are excepted from the operation of the act—that is to say, section 134 of the Judicial Code—and since the case at bar involves the construction and application of the Constitution of the United States, it belongs to the class of cases not affected by the provisions of section 134, and the decision of the Circuit Court of Appeals is reviewable because of the provisions of section 241 of the Judicial Code. The *Macfadden case* differs from the case at bar in that the former originated in the district court of the United States, and arose under the criminal laws, and was governed by section 128 of the Judicial Code, which made all judgments of the Circuit Court of Appeals final where the source of jurisdiction was the criminal laws; while the latter case arose in Alaska and involved the construction and application of the Constitution of the United States, and is governed by section 134 of the Judicial Code, which expressly excepts from the class of cases in which the judgment of the Circuit Court of Appeals is made final cases involving the construction and application of the Constitution of the United States.

What has been said of the case of *Macfadden vs. United States, supra,* is equally true of the other case cited by the attorney general for the Territory. In each of those cases the finality of the judgment of the Circuit Court of Appeals is determined by the source of jurisdiction and not by the character of the questions involved, so that if the source of the jurisdiction is such that cases so arising are made final by express terms of the act, they are final, notwithstanding the further fact that questions of a character which might have permitted a direct appeal to this court were also involved. If, therefore, a party having a right to go directly to this court chose to invoke the jurisdiction of the Circuit Court of Appeals, he was bound by the decision of that court, under the terms of the act—a situation that could not arise in connection with appeals from Alaska, where the decisions of the Circuit Court of Appeals are made final only in the

cases designated, which depend not upon the source of jurisdiction, but upon the character of the questions presented.

Stated in somewhat different language, but leading to the same conclusion, it may be added that section 238 of the Judicial Code provides that appeals may be taken from the district courts direct to the Supreme Court in any case that involves the construction or application of the Constitution of the United States.

Likewise, section 247 provides that appeals may be taken from the district courts of Alaska direct to the Supreme Court in all cases which involve the construction or application of the Constitution.

Counsel for defendant in error in his brief (page 8) concedes that in this case a writ of error might have been taken from the Supreme Court direct to the district court for Alaska, because of the constitutionaal questions raised by the demurrer of the plaintiff in error.

Section 128 provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review decisions of the district courts in all cases other than those in which appeals may be taken direct to the Supreme Court, as provided in section 238.

Likewise, section 134 provides that, in all cases other than those in which an appeal will lie direct to the Supreme Court, appeals shall lie from the district court for Alaska to the Circuit Court of Appeals for the Ninth Circuit.

Section 128 provides that, except as provided in sections 239 and 240, the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent upon diversity of citizenship of the parties, cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases.

Likewise, section 134 provides that in all cases other than those in which an appeal will lie direct to the Supreme Court, as provided in section 247, the judgments, orders, and de-

crees of the Circuit Court of Appeals in Alaska cases shall be final.

It having been conceded by the attorney general for Alaska that the instant case is one in which a writ of error from the Supreme Court to the district of Alaska might have been allowed (and this proposition cannot be questioned), it is not a case other than one in which appellate jurisdiction of the Supreme Court, on a direct appeal, is conferred by section 247; therefore the decree of the Circuit Court of Appeals is not final.

In so far as the present case is concerned, the relevant parts of section 134 are as follows:

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in section 247, * * * writs of error and appeals shall lie from the district courts for Alaska * * * to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders, and decrees of said court shall be final *in all such cases.*"

Obviously, the last four words italicized have reference to the words "cases other than," in the first line of the section; there can be no other interpretation that will not eliminate the word "such." Those four words terminate a sentence beginning with the words "In all cases other than." Manifestly, the purpose of the section is to assimilate the practice and appellate jurisdiction for review of Alaska cases to the practice and jurisdiction governing writs of error for review of cases in the Federal courts within the States. The beginning and termination of the sentence are tied together for that purpose.

If the decree of the Circuit Court of Appeals is not final by force of any statute, then by section 241 the right to have the decision of the Circuit Court of Appeals reviewed by the Supreme Court is absolute.

The cases heretofore cited in this brief clearly sustain this

doctrine. In addition to those cases, the case of *Ohio R. R. Commission vs. Worthington*, 225 U. S., 101, 104-105, and the cases therein cited, sustain the jurisdiction of this court to entertain the present writ of error beyond question, and require the denial of the present motion to dismiss the same. The inevitable conclusion deducible from the decisions in the cases cited is, that, as to cases of which appellate jurisdiction is given both to the Circuit Court of Appeals and to the Supreme Court, the former is an intermediate tribunal, and successive appeals, first to that court, and second to the Supreme Court, are authorized and lawful.

Respectfully submitted,

J. A. HELLENTHAL,
HARVEY M. FRIEND,
Counsel for Plaintiff in Error.

Supreme Court, U. S.
JAN 28 1949
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

No. 117

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

In Error to the United States Circuit Court of Appeals
for the Ninth Circuit.

BRIEF OF PLAINTIFF IN ERROR

J. A. HELLENTHAL,
HARVEY M. FRIESEN,
Counsel for Plaintiff in Error.

Alaska Legal Printing Co.

In the

Supreme Court of the United States

NO. 387

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error

vs.

TERRITORY OF ALASKA
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF PLAINTIFF IN ERROR

J. A. HELLENTHAL,
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SUPREME COURT OF THE UNITED STATES

ALASKA PACIFIC FISHERIES,
a corporation,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

No. 387.

BRIEF OF PLAINTIFF IN ERROR.

INDEX.

	Page
Statement of Facts	5
Statement of Errors Relied Upon	8
Argument	11
The Act of the Territorial Legislature upon which this Proceeding is based, denies to the Plaintiff in Error the Equal Protection of the Laws	12
visions of the Organic Act	19
(a) The Tax is not a License Tax but a Specific	
The Act of the Territorial Legislature Violates the Pro-	
Property Tax	26
(b) In Alaska, License Taxes, in order to be valid must Comply with the Conditions Imposed by Section 9 of the Organic Act	35

CITATIONS.

	Page
Banger's Appeal, 109 Pa. St. 79	40
City of Brookfield v. Toory, 43 S. W., 387	32
City of St. Louis v. Spiegel, 2 S. W., 839	40
Clark v. Brunswick, 43 N. W. Law, 175	47
Ellis v. Frazier, 63 Pac. 642	32-40
Fire Dept. of Milwaukee v. Halvanstein, 16 Wis., 136	40
Gache County v. Jensen, 61 Pac., 303	47
Henderson v. London & Lancashire Ins. Co., 135 Ind., 23	40
In re Yot Sang, 75 Fed., 983	14
In re Tax Delinquency in St. Louis County, 73 N. W., 970	40
In re Watson, 97 N. W., 463	40
In re Laundry License 22 Fed. 701	47
Johnson v. Macon, 62 Ga., 645	40
Lincoln Gas Co. v. City, 182 Fed, 927	24
Minces v. Schoenig, 75 N. W. 711	40
Morrill v. State, 38 Wis., 428	40
Pittsburg, Cincinnati & St. L. Railroad Co. v. State of Ohio, 30 N. E., 435	32-40
Pittsburg Railroad Co. v. Pittsburg, 60 Atl., 1080	32
Portland Bank v. Apthorp, 12 Mass, 252-256	40
Rasmussen v. United States, 197 U. S., 516	17
Reser v. Umatilla Co., 86 Pac. 595	40
Standard Oil Co. v. Commonwealth, 82 S. W., 1020	32
State v. Pennoyer, 65 N. W., 113; 18 Atl., 878	40
State v. Whitcom, 122 Wis., 110; 99 N. W., 468	40
State v. Smith, 35 Atl., 506 (Conn.) 52 Am. St. Rep. 301	47
Sunset Telephone Co. v. City of Medford, 115 Fed. 202	47
Welton v. State of Missouri, 91 U. S., 278	32
Willis v. Standard Oil Co., 52 N. W., 652-4	40

SUPREME COURT OF THE UNITED STATES

ALASKA PACIFIC FISHERIES,
a corporation,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

No. 387.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This action was brought to recover taxes claimed to be due under the Act of the Territorial Legislature of Alaska. In the year 1915 the Alaska Legislature passed a revenue bill, the pertinent portions of which are as follows:

> "An Act to establish a system of taxation, create revenue and provide for collection thereof, for the Territory of Alaska, and for other purposes; and to amend 'An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes,' approved May 1, 1913, and declaring an emergency.
>
> "Be it enacted by the Legislature of the Territory of Alaska.
>
> "Sec. 1. That any person, firm or cor-

poration prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska shall apply for and obtain a license and pay for said license for the respective lines of business as follows:

"8th. Fish traps: fixed or floating, one hundred dollars per annum. So called dummy traps included."

The plaintiff in error owns and operates three salmon canneries in Southeastern Alaska. Some of the salmon canneries in Alaska are so situated, owing to natural conditions, that the salmon canned are caught by the use of seines, while others are so situated that seines cannot be used but fish traps must be employed for that purpose. The salmon canneries of plaintiff in error are so situated that it is obliged to employ fish traps in order to catch the salmon required at its canneries for canning purposes. (See Record, page 22, Par. IV.) All of plaintiff in error's canneries were operated by it during the year 1915, and during that season 19 fish traps were employed in catching the salmon canned by it at its canneries. None of the fish caught in any of these traps was sold until after it was canned. Plaintiff in error made no other use of its fish traps and paid its license taxes under the act of June, 1906, but did not apply for or take out a license under the Territorial Act of 1915.

This action was brought to recover $1900.00

claimed to be due the Territory as taxes on account of the employment by plaintiff in error of 19 fish traps as related.

The facts above stated were agreed to by the parties as appears from the agreed statement of facts. (See Record, page 21.)

It was urged before the trial court that the Act of the Territorial Legislature, which forms the basis of this action, was void, for the reason, first, that it was obnoxious to the provisions of the Constitution of the United States, more especially the provisions of the Fourteenth Amendment, in that under it the plaintiff in error was denied the equal protection of the laws and further, that the act was void because it was obnoxious to the provisions of the Organic Act of the Territory of Alaska in that the moneys sought to be recovered were taxes laid in violation of the provisions of the Organic Act in this, that such taxes were not uniform upon the same class of subjects, were not based upon an assessment of the thing which formed the subject of taxation, made according to the actual value thereof or otherwise, and that the tax was not so levied that the same was not in excess of one per cent (1%) of the assessed valuation. The provisions of the Organic Act bearing on this question are contained in Section 9, and are as follows:

> "All taxes shall be uniform upon the same class of subjects and shall be levied

> and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of the property therein in any one year; nor shall any incorporated town or municipality levy any tax for any purpose in excess of two per centum of the assessed valuation of property within the town in any one year; * * * and all laws passed, or attempted to be passed, by such Legislature in said Territory inconsistent with the provisions of this section shall be null and void."

The learned trial court denied the correctness of the contentions made by the plaintiff in error, and entered judgment for the amount prayed for, whereupon the cause was taken to the Circuit Court of Appeals for the Ninth Circuit on writ of error. In that court all the questions raised in the trial court above referred to were again raised and presented to the court for consideration, and the Circuit Court of Appeals having affirmed the judgment of the trial court the cause was taken to this court on writ of error.

STATEMENT OF ERRORS RELIED UPON.

The United States Circuit Court of Appeals erred in holding and deciding that the act of the Territorial Legislature, which formed the basis of this action, was valid, especially insofar as it applied to the facts in this case. The validity of

said act of the Territorial Legislature, especially insofar as it applies to the facts in this case, was denied and drawn in question by the plaintiff in error in the trial court in the first instance and again when the cause was presented to the United States Circuit Court of Appeals for the Ninth Circuit on writ of error, on the ground that the same insofar as it applied to the facts, was repugnant to the constitution of the United States and in contravention thereof, in that under it the plaintiff in error was denied the equal protection of the laws in that it was required to pay a tax which others similarly situated were not required to pay.

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding and deciding that the Territorial Legislature had the power of discriminating against the plaintiff in error in connection with the levying of assessment and collection of taxes and that a tax that did not apply to all similarly situated could be levied and collected by the Legislature.

The United States Circuit Court of Appeals for the Ninth Circuit especially erred in holding and deciding that in levying and collecting taxes the Territorial Legislature might discriminate against those engaged in the business of fishing, for and canning salmon, so situated because of natural conditions that they were obliged to resort to the use

of fish traps to procure their fish supply, not being able to use seines, and in favor of those so situated because of natural conditions that they were in a position to supply their canneries and fisheries with fish caught by use of seines, and that the Legislature could thus discriminate by levying a tax on fish traps and those employing such traps which was not levied on seines or upon those employing seines.

And the validity of the act of the Territorial Legislature was further denied and drawn in question by the plaintiff in error in the trial court in the first instance, and before the Circuit Court of Appeals for the Ninth Circuit when the cause was there presented for review on writ of error on the ground that said act was repugnant to the provisions of the Organic Act of the Territory of Alaska and in contravention thereof, in that under it a tax was levied which was not uniform upon the same class of subjects, was not based upon any assessment whatsoever, and was not based upon an assessment according to the value of the thing taxed and was not so levied as not to exceed one per cent (1%) of the assessed valuation.

The United States Circuit Court of Appeals erred in holding and deciding that the tax sought to be collected in this proceeding was a license tax and was for that reason valid, notwithstanding the fact that it was not uniform upon the same class

of subjects, was not based upon an assessment made according to the actual value of the thing which formed the subject of taxation, and was not so levied as not to exceed one per cent (1%) of the assessed valuation. The position taken by the plaintiff in error in this regard being:

First, that the tax in question was not a license tax but a specific tax on personal property; and

Secondly, that it was immaterial whether the tax was a license tax or a specific property tax, in view of the fact that the provisions of the Organic Act imposing the limitations upon the taxing power relate to "all taxes" to include license taxes as well as property taxes.

ARGUMENT.

The error made by the United States Circuit Court of Appeals for the Ninth Circuit in holding and deciding that the Act of the Territorial Legislature, upon which this action is based, was valid, is such that it embraces all the other errors assigned, the last named errors being merely erroneous decisions with reference to the contentions made by the plaintiff in error against the validity of the act. but for convenience in discussion these contentions and the decisions of the Circuit Court of Appeals in relation thereto, will be discussed in their order.

I.

THE ACT OF THE TERRITORIAL LEGISLATURE, UPON WHICH THIS PROCEEDING IS BASED, DENIES TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS.

It was agreed that some of the salmon fisheries operating in Alaska are so situated, owing to natural conditions, that the supply of fish necessary to keep the canning plant in operation can be caught only by the use of seines, and that others are so situated, owing to natural conditions, that this supply can be caught only by resorting to the use of fish traps. It was further agreed that the Alaska Pacific Fisheries owns and operates three canneries in Alaska so situate, owing to natural conditions, that it cannot use seines in catching the fish canned by it, but is obliged to resort to the use of fish traps for that purpose. (See record, pages 15-16.) Neither does the act of 1915, nor any other law in force in the territory impose a tax on seines or on those engaged in fishing by means of seines, but the first named act lays a tax on fish traps at the rate of one hundred dollars each.

It is contended that this is an unjust discrimination in favor of the fisheries so situated because of natural conditions that they can catch

their fish supply by the use of seines and against those so situated because of natural conditions, that they are obliged to employ fish traps for this purpose. The product of the fisheries situated as are the former, meets the product of those situated as are the latter in the markets of the world. Here each must compete with the other. If one is required to pay a tax which the other is not required to pay, the product of the former exceeds the product of the latter in cost of production to the extent of the tax paid, for obviously any tax paid by one carrying on such business, whether assessed against the business or against the appliance by which the business is conducted, forms a part of the cost of the product. If, therefore, one is obliged to pay a tax not required from the other, the more fortunate competitor is not only enabled to make a larger profit than the other, but he is enabled to undersell such other and if he desires to do so to drive him out of the market altogether and thus secure a monopoly for himself. The statement that one competitor having an advantage over the other, regardless of the fact that such advantage may be slight, can drive such others out of the market and secure a monopoly for himself, finds ample support in the history of rate discrimination. Clearly, it cannot matter whether the additional cost of the commodity offered in the market is due to an extra rate charged by a transportation company or to an

extra tax charged by the government. In either case, the result is unjust discrimination, the ultimate and natural effect of which is monopoly. A law which in its operation has this effect denies the qual protection of the laws. This precise question was passed upon by the Federal Court in the case of *In re Yot Sang*, 75 Fed., 983.

This case arose in the State of Montana. The Legislature of that State passed an act requiring laundries that were operated by hand to pay a license of $25 per annum, and requiring laundries that were operated by steam to pay a license fee of $15 per annum. It will be noted that the effect of this law is precisely the same as the effect of the Alaska License Law. The amount of the license fee is determined by the methods employed in operating the business. In Montana, laundries operated by hand were required to pay a license fee of $25; in Alaska, salmon fisheries operated by the use of fish traps are required to pay a license tax of $100 on each trap employed; in Montana, laundries operated by steam were required to pay a license fee of $15 per annum; in Alaska, salmon fisheries operated by the use of seines are not required to pay any license tax whatsoever. This act of the State of Montana was held to be in violation of the Fourteenth Amendment and was declared void. The reasons given for the decision are as applicable to the facts in the case at bar as

they were to the facts in the case then before the court. In the course of the opinion it is said

> "It is urged, however, that where the same business is conducted by different modes, it is unjust, and in violation of the rule that each man should have the protection of equal laws, to place upon one a greater burden than upon the other. If the mode of conducting a business is subject to a license, then all progress could be delayed. It seems to me that in this case it appears that an additional burden is cast upon those conducting the business of a laundry other than by steam, where one or more persons are employed, than is imposed upon those conducting a steam laundry ,and that no conditions are presented which would justify the state in adding this additional burden. It is therefore held that the arresting of Yot Sang for the refusal to take out a license, and pay therefor $25 before he could conduct a laundry business in which one or more persons were employed, the same being other than steam, was void, by virtue of the said Fourteenth Amendment to the Constitution."

The question of what constitutes a proper classification is well illustrated by the decision in a case that arose in Nebraska and was tried before the Federal Court there. A city council had passed an ordinance requiring a license tax from gas companies and also from electric light and power companies. The fee or tax exacted was not the same in each case. The electric companies and the gas

companies both sold light, heat and power in the same city, so that one was a competitor of the other, just as the salmon canneries in Alaska are, of course, obliged to sell their product in competition one with the other. The decision was not based upon the provisions of the Fourteenth Amendment but upon a provision contained in the Nebraska Constitution requiring uniformity of taxes upon the same class of subjects, and this is in effect what the Fourteenth Amendment requires. Under the provisions of the Fourteenth Amendment it is not necessary that all persons, however situate, shall be taxed alike, but it is necessary that all those belonging to the same class shall be taxed alike, and this was the requirement of the Nebraska Constitution. The Court held the ordinance void as being obnoxious to this provision of the Nebraska Constitution.

The Circuit Court of Appeals expressed the opinion that Congress had, under the Constitution, the power to enact legislation under which those so situate that they were obliged to fish by the use of fish traps would be discriminated against in favor of those so situate that they employed seines for that purpose, and that having such power it could delegate it to the territorial legislature. It is not necessary to inquire into the extent of the power of Congress in this regard, for no such power was delegated by Congress to the Legislature. Un-

der the provisions of the Organic Act, the Fourteenth Amendment is in full force and effect in the Territory, so that the citizens of Alaska are entitled to the equal protection of the laws.

The federal constitution was, insofar as it limited the powers of the general government, in full force in the Territory before Congress had taken any action in the matter. (*Rasmussen vs. United States*, 197 *U. S.*, 516.) When the Organic Act was adopted, however, it was provided that the constitution should "have the same force and effect in the Territory as elsewhere in the United States," that is to say: the limitations placed by that instrument upon the powers of the states were so extended as to become limitations upon the powers of the Territory. The third section of the Organic Act provides as follows:

> "That the constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States."

And the following provision is contained in the ninth section:

> "The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

In view of the fact that it was provided in the

Organic Act that the Constitution of the United States should have the same force and effect within the Territory as elsewhere in the United States, it must follow that the Fourteenth Amendment which contains limitations upon the power of the state legislatures also limits the powers of the territorial legislature. This was the evident purpose of Congress when it provided that the Constitution should have the same effect in Alaska that it had elsewhere in the United States, for elsewhere in the United States the powers of the various legislatures are limited by the provisions of this amendment.

Since the Constitution, insofar as it limited the powers of the general government, was already in force in the Territory, under the decision of this court in Rasmussen vs. United States, the provisions of the Organic Act extending the Constitution to the Territory would have no effect unless it was meant that the Constitution should be extended to its fullest extent, so that the limitation imposed upon the power of the states would also be imposed upon the power of the Territory, acting through its legislature, and the language employed under which the Constitution is to have the same effect as elsewhere in the United States, clearly points out the intention of Congress in this regard.

II.

THE ACT OF THE TERRITORIAL LEGISLATURE VIOLATES THE PROVISIONS OF THE ORGANIC ACT.

The act, on its face, is a revenue act designed to raise revenue requiring the payment of a fixed sum in each of the enumerated cases for a license. It is entitled:

> "An Act to establish a system of taxation to create revenue and provides for the collection thereof," etc.

Section I provides:

> "That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska shall apply for and obtain a license and pay for said license for the respective lines of business as follows:
>
> "8th. Fish Traps: Fixed or floating, one hundred dollars per annum. So-called dummy traps included."

That the sole object of the act is the collection of revenue is not disputed. This much is conceded by the counsel for the Territory, and the Circuit Court of Appeals held it to be such. If then the moneys sought to be raised under the provisions of the act are taxes, it remains to be seen how and in what manner taxes may be collected in the Territory and what limitations up-

on the taxing power are imposed by the Organic Act.

Whatever power is possessed by the Territorial Legislature of Alaska is derived from the Organic Act. Congress has under the Constitution plenary power to legislate for the territories. It may either exercise this power or it may delegate it in whole or in part to a territorial legislature. In the case of Alaska, it has in part delegated its powers in this regard to the Legislature of the Territory by the Organic Act.

The Organic Act of a territory is a grant of legislative powers. Such grants are always strictly construed. No power passes except such powers as are either expressly conferred or are conferred by necessary implication. The powers expressly conferred are those that are stated in express terms. The powers conferred by necessary implication are limited to such as may be necessary to carry into effect the powers expressly granted.

Every sovereign power has the inherent right to collect revenues since this right is necessary to its existence. The Territory of Alaska, however, is not a sovereign power so as to be endowed with this inherent right. It is a mere territory of the United States and its Legislature is the creature of the Congress; like other legislative bodies,

similarly created, it is endowed with such powers only as are conferred upon it.

Section 9 of the Organic Act contains the following provision:

> "The legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States."

This same section also contains the following provisions:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof. No tax shall be levied for territorial purposes in excess of one per centum on the assessed valuation of property therein in any one year, nor shall any incorporated town or municipality levy any tax for any purpose in excess of two per centum of the assessed valuation of the property within the town in any one year * * * and all laws passed or attempted to be passed, by such legislature in said territory inconsistent with the provisions of this section shall be null and void."

Under the provisions extending the legislative power to all rightful subjects of legislation, the power to raise revenue by means of taxation is, in a general way, subject to the limitations elsewhere in the same section contained, conferred.

But since legislative grants are strictly construed, the powers thus conferred in a general way must be exercised in strict conformity with the requirements of the Organic Act itself and in strict subordination to the limitations imposed.

Section 9, containing this general grant of powers, also contains the limitations placed by Congress upon the taxing power with a view of protecting the people of Alaska against unequal, unjust and excessive taxation, and contains an express mandate that all laws passed, or attempted to be passed, which do not conform to the provisions of that section, shall be void.

In order to determine, therefore, whether the tax in question is valid, it is only necessary to inquire whether it conforms to the provisions of Section 9. If it fails to comply with the requirements of this particular section, Congress has expressly provided that it shall be void.

Whether this tax be viewed as a tax on fish traps, that is to say, a specific property tax, or a tax on the business of fishing, that is to say a license tax, it fails to conform to the provisions of Section 9, above referred to.

Viewed as a specific tax on property the tax in question fails to comply with the provisions quoted in that it is not assessed according to value, each fish trap, including dummy traps, being taxed $100 regardless of its value. In this connection

it may be observed that it was agreed (See Record, page 22) that some of the traps of plaintiff in error were worth as much as ten thousand dollars while others did not exceed one thousand dollars in value. The tax, therefore, if considered as a tax on the fish traps must be regarded as not being assessed according to actual value in direct violation of the provisions of the Organic Act.

In view of the fact that the tax laid amounts to ten per cent. on such fish traps as do not exceed one thousand dollars in value, it is also clearly laid in violation of the provision that no tax levied for Territorial purposes shall exceed one per cent. on the assessed valuation.

While no assessment was made in this case, the value of some of the traps is agreed in the stipulation to be no more than one thousand dollars.

So, also, if the tax is viewed as a license tax upon the business of fishing by means of fish traps.

It is stipulated in this case that the plaintiff in error is operating a salmon cannery, so situated owing to natural conditions, that it is obliged to resort to fish traps to catch its fish supply. It was further stipulated that other canneries in Alaska are so situated, because of natural conditions, that those operating these canneries resort to the use of seines for that purpose. The product of all of these canneries is sold in the same mar-

ket. If, therefore, the tax is regarded as a license tax imposed on those engaged in fishing by the use of fish traps, it imposes a burden upon those so engaged that is not imposed on those engaged in fishing by the use of seines, since seines are not taxed under the act and no tax is imposed on those engaged in fishing by means of seines.

Lincoln Gas Co. vs. City 182 *Fed.* 927.

Viewed as a license tax on the occupation of fishing, the value of this occupation which becomes the subject of taxation, was not assessed, nor was it in any wise considered in laying the tax, so that the tax is laid without any regard to the actual value of the thing taxed in violation of the express provision of the ninth section of the Organic Act upon the subject. And there is, of course, no way of telling to what extent the act violates the provisions of the Organic Act limiting the amount of taxes in any one year, if levied for Territorial purposes, to one per cent. on the assessed valuation. This much, however, is certain in this regard that if the fish traps were assessed at their actual value, the tax would in some cases, at least, amount to ten per cent. since it is stipulated that some of the fish traps of plaintiff in error do not exceed one thousand dollars in value.

How then can the tax be sustained in the face

of the express mandate contained in Section 9 of the Organic Act, where all the limitations upon the taxing power above cited are also found, to the effect that all legislation, or attempts at legislation, which do not conform with the provisions of that section, shall be void.

The Circuit Court of Appeals expressed the opinion that the tax sought to be collected was a license tax, and that because of the fact that it was a license tax it was not necessary that it should comply with the limitations upon the taxing power referred to above. This, notwithstanding the fact that by the express terms of the provisions in the Organic Act referred to, "all taxes", without exception, are made subject to the requirements therein mentioned.

This decision of the Circuit Court of Appeals presents two questions for discussion: The first is, "Is the tax sought to be collected a license tax"; and the second it, "Is it necessary to the validity of license taxes that these should comply with the limitations placed upon the taxing power by the Organic Act, such as those contained in Section 9 of the Alaska Organic Act above quoted."

II-a.

THE TAX IS NOT A LICENSE TAX BUT A SPECIFIC PROPERTY TAX.

Even though it were conceded that the position taken by the Circuit Court of Appeals, that license taxes need not comply with the requirements contained in Section 9 of the Organic Act, hereinbefore discussed, were the correct one, it would not follow that the tax now under discussion should be sustained, for this tax, although denominated a license tax, is in no sense a tax of occupation. It is not a license tax at all but a specific tax on fish traps.

That it was the intention of the Legislature to lay a specific property tax on fish traps becomes apparent when the language employed is considered. Any other construction would not only make the meaning of the provision so uncertain as to render it void on that account, but would do violence to the language itself. The act provides that those engaging in certain lines of business shall pay a license tax, then follows an enumeration which includes the following: "8th. Fish-Traps: Fixed or floating, one hundred dollars per annum. So called dummy traps included." Now a fish trap is not a line of business, but a device employed in catching fish. A fish trap is tangible

property and the fact that it is enumerated as a line of business does not make it such.

The learned trial judge expressed the opinion that what the Legislature meant was, quoting from the opinion, "that whoever conducts the business of fishing by means of fish traps must pay the license required," and this opinion was adopted by the Circuit Court of Appeals. Not only is there no reason for asserting that this is what the Legislature meant to say, but upon examining the act it will be seen that this is the one thing the Legislature did not mean to say. The act provides that there shall be paid for each fish trap, whether fixed or floating, the sum of one hundred dollars per annum—so called dummy traps included. It does not matter whether the trap is fixed or floating, nor does it matter whether the trap is a dummy trap or one used to catch fish, the tax is the same in any case.

Now dummy traps are not used to catch fish, they are, as the name indicates, mere dummies. The learned trial judge, in the opinion, correctly and clearly defines a dummy trap as follows: "A dummy trap is a sham tram not used for fishing but designed simply to squat on and hold a trap location." The owners of dummy traps may not be engaged in the business of fishing at all. They may be persons engaged in seeking out and locating by means of dummy traps favorable trap

locations with a view of selling these locations to persons engaged in fishing. Yet under the act they would be obliged to pay the tax of one hundred dollars on each dummy trap. The fact that a tax is required on a trap not used in fishing shows clearly that the tax was not intended to be imposed on the business of fishing by means of traps because these traps cannot be so employed.

It was urged that it was immaterial whether the tax imposed on dummy traps was a valid tax, since the traps referred to in the cause on trial were not dummy traps. This, however, is no reply to the argument advanced. Reference is not here had to dummy traps for the purpose of ascertaining whether the tax on these traps is a valid one, but for the purpose of ascertaining the intention of the Legislature in taxing fish traps generally. Dummy traps were placed in the same class with other traps and the character of the tax imposed on dummy traps is the same as that of the tax imposed on other traps. Hence, since the Legislature could not intend the tax imposed on dummy traps to be a tax on the business of fishing with dummy traps, as the latter cannot be employed in fishing, the Legislature did not intend the tax on other fish traps to be a tax on the business of fishing therewith.

Again, under the construction placed on the act by the court the line of business sought to be

taxed is changed from the fish trap business, or the business of "fish traps," to the business of fishing; that this construction is not in acccord with the legislative intent is evident from the fact that the sixth line of business enumerated is that of the fisheries. If this tax had been intended as a tax on the fisheries it would have been dealt with under that head. Nor does it seem reasonable that the Legislature intended to impose two separate taxes on the fisheries, at least not by a single enactment.

Independent of these considerations there is not as much reason for saying that the fish trap business means the business of fishing by means of fish traps as there would be for saying that it means the business of trading in or buying and selling fish traps, or the business of building fish traps, or the business of designing or inventing new kinds of fish traps, or any other business that relates to fish traps.

In common parlance, the business of fishing with fish traps would be referred to as the fishing business, while the phrase, fish-trap business, would be applied to one engaged in the business of buying and selling or trading in fish traps. Similar phraseology is frequently employed and the meaning attached thereto is always the same.

A consideration of the whole law makes it clear that the Legislature intended to place a

specific property tax on fish traps of one hundred dollars each regardless of whether the traps were used in catching fish or not. An attempt to place any other construction upon the act merely leads to confusion and is unwarranted by the language employed.

Nor would the construction contended for by the court help the matter out any. If that construction were adopted the tax sought to be collected would still remain a specific tax on property. To say that those engaged in the business of fishing by means of fish traps shall pay a tax of one hundred dollars on each trap, does not change the character of the tax from a tax on the fish trap as property to a tax on the business of fishing by means of fish traps, as a business. It merely limits the persons liable to pay a tax on fish traps to those engaged in fishing by means of such traps. The tax still remains a specific property tax on fish traps to be paid only by those employing such traps in connection with the fishing business. The tax does not become a tax on the business but remains a tax on the traps at the rate of one hundred dollars for each trap. To say that one engaged in a given busines shall pay a fixed tax on part or all the property used in connection with the conduct of such business does not relieve the tax imposed of its character as a tax on property. If this would result, one engaged in farming by use of horses could

be taxed at a fixed rate per horse regardless of its value, or any farmer could be taxed at a fixed rate per acre of land farmed, regardless of its value. A railroad company engaged in the transportatation business by means of cars and locomotives could be taxed at a fixed rate for each car or locomotive, regardless of its value. In fact, all the tools, implements and appliances used or employed in connection with the various industrial pursuits could in this manner be taxed without regard to the value of the thing taxed, except only such property as is not used or employed for any purpose whatever. No property would be protected by the provisions of the organic law that all taxation shall be according to value, except property that is absolutely useless. A theory that leads to such conclusions cannot be regarded as sound. Regardless of the angle from which this tax is viewed, therefore, it is and remains a specific tax on property.

The view taken by this Court, however, concerning the nature and effect of license taxes makes it a matter of very little importance whether this is a direct tax on property or a tax on the business in which the property is employed. This Court held that a tax on the business of a peddler selling goods of a given character must be regarded as a tax on the goods sold by such peddler. It would follow, therefore, that a tax on the business of fishing by means of fish traps must be regarded

as a tax on the fish traps employed in such business.

Welton vs. State of Missouri, 91 *U. S.*, 278.

While the State Courts have held that license taxes on business were not property taxes, they have uniformly held that where a business was taxed and the amount of the tax was measured by the property employed, the tax could not be regarded as a license tax on business but must be regarded as a tax on property.

Standard Oil Company v. Commonwealth, 82 *S. W.*, 1020;
Pittsburg, Cincinnati & St. L. Railroad Co. v. State Ohio, 30 *N. E.*, 435;
Pittsburg Railroad Co. v. Pittsburg, 60 *Atl.*, 1080;
City Brookfield v. Toory, 43 *S. W.* 387;
Ellis v. Frazier, 63 *Pac.*, 642.

This tax is clearly a tax on fish traps, and if it be conceded that license taxes need not comply with the provisions contained in Section 9, and it be further conceded that property may be taxed, as is the case, merely calling a tax a license tax, the protection which the provisions of Section 9 were intended to give, have been entirely done away with.

Not only would this permit the taxing of property without regard to uniformity and without regard to assessment according to value, but the pro-

vision limiting the tax to one per cent. on the assessed valuation would likewise be made ineffective. Under the stipulated facts in this case some of the fish traps belonging to plaintiff in error do not exceed one thousand dollars in value, yet each of these traps is taxed one hundred dollars, so that the tax is ten per cent., whereas the Organic Act provides that it shall not exceed one per cent.

The Circuit Court of Appeals, in the opinion, used the following language:

> "Carrying on the 'line of business' of fish traps in Alaska, by common or proper understanding of persons who are at all conversant with fishing in Alaska, is understood to be fishing with fish traps: Hence the words should be given their ordinary meaning as used in the business of fishing in Alaska.

If the Circuit Court of Appeals were not in error in assuming that by common or proper understanding the words used conveyed the meaning sought to be attached thereto, the position of the Circuit Court of Appeals would be the correct one, but upon this matter the Circuit Court of Appeals are in error. There is not one word in the stipulation of facts relating to this matter whatsoever. And while it is necessary, whenever words are sought to be given a meaning other than that which they have in ordinary use, to offer and receive proof on that subject, the

language employed in the act has no peculiar or unusual meaning as employed by the people of Alaska and is not by common or proper understanding of persons engaged in fishing in Alaska, or at all, understood to refer to fishing with fish traps. The Circuit Court of Appeals was undoubtedly misled in this regard by a vague expression found in the opinion of the trial court. Just what the trial court intended to say, plaintiff in error does not know, but plaintiff in error is satisfied that it was not the intention of the trial court to convey the impression adopted by the Circuit of Appeals, since this would not be in conformity with the facts.

In this case it is important to note that the Circuit Court of Appeals assumed that laws of this character should receive the broadest and most liberal construction. The contrary is true. Laws relating to taxation are strictly construed against the taxing power. This proposition is well established. See Gould v. Gould decided by this court November 19, 1917, and not yet published.

It requires no further argument to show that if taxes of this character can be levied and collected without regard to whether they conform to the requirements of the Organic Act of Alaska, the public are deprived of all the protection that these requirements were intended to give.

II-b.

IN ALASKA, LICENSE TAXES, IN ORDER TO BE VALID, MUST COMPLY WITH THE CONDITIONS IMPOSED BY SECTION 9 OF THE ORGANIC ACT.

It is said in the opinion of the Circuit Court of Appeals that well considered cases may be found in support of the position that license taxes may be levied without regard to the limitations placed upon the taxing power. It is quite true that there are several decisions to the effect that under the peculiar provisions of the state constitutions of the states wherein such decisions were rendered, license taxes are not required to be uniform or assessed according to value, but the constitutional provisions under which all the decisions that so hold were rendered, will, upon examination, be found to be wholly unlike the provisions contained in the Organic Law of Alaska. Of course, the effect of a provision contained in the Organic Law of any state or territory must depend in each case upon the language employed, and the decisions of the courts relating thereto must be read in the light of the language of the provision construed.

The cases referred to may be grouped in three classes. Those of the first class are rendered under constitutional provisions so worded as to expressly except license taxes from the operation of the

requirements of uniformity and assessment according to value. Decisions rendered under constitutional provisions of this character can, of course, have no application to the facts in this case, for the Alaska Organic Law contains no such provisions. The Organic Act of Alaska provides that all taxes must be uniform and assessed according to value and contains no provision to the effect that license taxes may be assessed without regard to these requirements.

The decisions under the second class are those rendered under constitutional provisions expressly limiting the application of the requirements of uniformity and assessment according to value, to property taxes. In those states where a constitutional provision is found to the effect that "property taxes" shall be uniform or that "property taxes" shall be assessed according to value, it has been held that license taxes need not be uniform or assessed according to value, as the case may be, for the reason that the constitutional requirements referred to are expressly limited in their application to "property taxes," whereas license taxes are not considered as property taxes or taxes on property but as taxes on occupation, and since such taxes are not taxes on property, constitutional requirements that relate only to "property taxes" are held to have no application to license taxes. This class of cases can also have no application to

this case for, as already stated, the Organic Act of Alaska does not provide that "property taxes" shall be uniform or that "property taxes" shall be assessed according to value, but that "all taxes" shall be uniform and assessed according to value without regard to their character.

The decisions of the third class are those which do not refer to license taxes at all but to license fees exacted under the police power for the purpose of regulation, as distinguished from license taxes exacted under the taxing power for the purpose of revenue. These cases, of course, rest upon an entirely different principle.

When in the interest of the public health, the public morals or the public safety, it becomes necessary to supervise or regulate an occupation or business, the legislature may require a license from those engaged therein for the purpose of regulating the same, and may in that connection adopt such regulatory provisions as may be necessary; it may also require the payment of a license fee sufficiently large to pay the costs of issuing the license and in addition thereto the costs of supervision and regulation. The fees required to be paid, however, cannot exceed the amount necessary for the purposes mentioned, and must be exacted in good faith to meet the expense of regulation and not for the purpose of raising revenue. In so acting the legislature proceeds under the

police power of the state. In the exercise of the police power the legislature is, of course, not restricted by the limitations placed upon the taxing power and it is for that reason that the validity of laws exacting license fees under the police power is not affected by the provisions of the Organic Law relating to taxes. Such license fees are not taxes and depend for their validity not upon a compliance with the constitutional requirements relating to taxes, but upon the question of whether the regulation in connection with which they are exacted is reasonably necessary to promote the public health, public morals, or public safety.

Not so in the case of license taxes. These have nothing to do with the public health, public morals or public safety. In imposing license taxes, the object and aim of the legislature is the collection of revenue. In character a license tax does not differ from any other tax. It is levied against the occupation or business of the person called upon to pay it just as a property tax is levied against the property of the person called upon to pay such tax, the object in each case being the production of revenue for the support of the government. The only difference between a license tax and a property tax lies in the procedure provided for enforcing the collection of the tax.

On the other hand, there is no similarity between license fees exacted under the police power

and license taxes exacted under the taxing power, although the method of procedure for their enforcement may in some respects be similar. As was said by Judge Cooley in his work on taxation, page 396:

> "The distinction between a demand of money, under the police power, and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases though the purpose is essentially different. The one is made for regulation and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power."

It will be seen, therefore, that the decisions that relate to license fees exacted under the police power have no application to the facts in this case.

None of the state constitutions contains a provision, as does the Alaska Organic Act, that all taxes must be assessed according to value. In this respect the Organic Law of Alaska differs from the consitutions of all the states, but several of the state constitutions contain provisions to the effect that all taxes must be uniform. While the language employed in most, if not all, of the constitutions containing this provision, differs from that employed in the Organic Act of Alaska, its effect is the same, and wherever this language is

employed and no further provision is found expressly limiting its operation to property taxes, it has been uniformly held that license taxes come within the constitutional provision, that they are taxes in the same sense as property taxes are taxes and must, therefore, in order to be valid, comply with the constitutional requirements of uniformity.

Banger's Appeal, 109 *Pa. St.* 79;
Willis v. Standard Oil Co. 52 *N. W.* 652-4;
In re Tax Delinquency in St. Louis County, 73 *N. W.* 970;
Minces v. Schoenig, 75 *N. W.* 711;
In re Watson, 97 *N. W.* 463;
Johnson v. Macon, 62 *Ga.* 645;
Henderson v. London & Lancashire Ins. Co. 135 *Ind.* 23;
Portland Bank v. Apthorp, 12 *Mass*, 252-256;
State v. Pennoyer, 65 *N. W.* 113; 18 *Atl.* 878;
City of St. Louis v. Spiegel, 2 *S. W.* 839;
Pittsburg C. & St. L. R. R. Co. v. State 30 *N. E.* 435;
Ellis v. Frazier, 63 *Pac.* 642;
Reser v. Umatilla Co. 86 *Pac.* 595;
Fire Dept. of Milwaukee v. Halvanstein, 16 *Wis.* 136;
Morrill v. State, 38 *Wis.* 428;
State v. Whitcom, 122 *Wis.* 110; 99 *N. W.* 468;

A review of the decisions of the state courts under constitutions containing limitations upon the taxing power, clearly points out one thing above all others, and that is, that in all cases the provisions containing these limitations are construed just as they are written. Wherever a constitutional requirement exists to the effect that taxes must be uniform, and this requirement is not expressly limited in its application to property taxes and is unaccompanied by any express provisions under which license taxes are exempted from its operation, the courts have held that the requirement applies to all taxes alike, including license taxes as well as taxes upon property. The Organic Law of Alaska provides that "all taxes" shall be uniform upon the same class of subjects. The provision applies to all taxes. No distinction is made between license taxes and property taxes. It refers to "all taxes"; that is to say, each and every kind of a tax, and since a license tax is a tax, it must, in order to be valid, conform to the requirement of uniformity, and this is in exact accord with the decisions of the state courts rendered under similar constitutional provisions.

But the Organic Act of Alaska does not stop here. It requires more than uniformity. The language is:

> "All taxes shall be uniform upon the same class of subjects * * * and the as-

sessments shall be according to the actual value thereof."

Under this provision, then, all taxes must be based upon an assessment, and this assessment must be according to the actual value of the thing which is the subject of taxation. No state constitution contains a provision to the effect that all taxes must be assessed according to the value of the thing taxed. This provision is peculiar to the Alaska Organic Law. Many state constitutions provide that all "property taxes" shall be levied according to actual value but none that all taxes shall be so levied.

But since the phrase "all taxes" is, when it occurs in the uniformity clauses of the state constitutions, held to include license taxes as well as property taxes, the same phrase, if applied to those clauses requiring assessments according to value, would of course be construed in the same manner if any of the state courts were called upon to construe it in that connection. The phrase "all taxes" cannot be construed except to embrace all money exactions made with a view of supplying revenue for the support of the government. Such money exaction is a tax, and it is immaterial whether it is made in the form of a license tax or a property tax. The phrase "all taxes" is at once the most comprehensive and the most all-inclusive of any that Congress could have employed. If this lang-

uage does not include license taxes, it is difficult to conceive of any language that would have been broad enough to include them.

The idea that the term "all taxes" does not include license taxes finds its origin in a wrong conception of what a license tax really is. It results from a confusion of license fees exacted under the police power with license taxes. There is nothing occult or mysterious about a license tax. It is not different from any other kind of a tax; it is simply a specific tax upon occupation, just as a specific tax on property is a tax on property. Money exactions under the police power may be allusive and peculiar in character because of the elasticity of the police power, but these characteristics do not apply to license taxes.

Viewed, therefore, from the standpoint either of reason or authority, the term "all taxes" must be held to include license taxes, and since the tax sought to be collected in this proceeding is not uniform upon the same class of subjects, is not based upon any assessment whatsoever, is not assessed according to value, and is such that there is no way of determining whether it violates the provision limiting the taxation to one per cent. for territorial purposes, it cannot be sustained under the provisions of the Organic Act.

The Circuit Court of Appeals, in the opinion, referred to a provision contained in Section 3 of

the Organic Act in support of the contention that it was the intention of Congress that license taxes might be assessed without regard to the question of whether or not such taxes complied with the requirements contained in Section 9. This provision reads as follows:

> "That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States, or to the game, fish and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the act entitled, 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several acts amendatory thereof: Provided further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

It will be observed that this provision, taken as a whole, is a limitation upon the power of the legislature. Congress had enacted a law with a view of collecting revenue to meet the expense of the general government in administering the laws in the territory. It was deemed desirable to keep

this law in force. Accordingly, a provision was inserted against its repeal by the territorial legislature and in order that this provision might not be given a broader construction than was intended for it, it was provided:

> "That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

The last mentioned clause, therefore, was a mere proviso inserted with a view of preventing misconstruction.

The Circuit Court of Appeals expressed the opinion that it was a recognition of the power of the legislature to impose taxes and licenses. It may be conceded that by inserting this provision it was recognized that the legislature had the power to levy taxes and require licenses, but the power to levy taxes and require licenses is one thing and the power to levy license taxes without regard to the question of whether these taxes are levied in conformity with the limitations upon the taxing power contained in section 9, is quite another thing.

That the legislature has the power to levy taxes cannot be doubted. The recognition of that power in this proviso added nothing to the authority of the legislature in this regard, for the power to levy taxes existed under the provisions of section 9, independent of its recognition in this proviso. But while the power to levy taxes exists under the

provisions of section 9, it must, as has already been pointed out, be exercised in conformity with the limitations imposed by the provisions of that section.

So, also, with reference to the power to require licenses. Licenses are required in connection with the regulation of those things which, to insure the public health, public morals or public safety, require regulation. They are required in connection with the exercise of the police power, and that the territorial legislature may exercise this power under the general grant of powers cannot well be doubted. The recognition of the power to require a license, therefore, recognizes no power in the legislature that it would not possess without such recognition. Hence, the proviso does not affect the question under discussion one way or the other.

While it is not deemed material to this inquiry, it may be noted that the Circuit Court of Appeals seems to have treated this recognition of the power to require licenses as a recognition of the power to exact a license tax. In so doing the court places upon the term "license" an erroneous construction. A license is one thing and a license tax is quite a different thing. One is required in the exercise of the police power and its object is regulation. If a fee is required, it cannot exceed in amount the cost actually incurred in connection with such regulation. The other is a revenue meas-

ure enacted under the taxing power. Its object is not regulation but the production of revenue to meet the general expense of government. The money exactions made under it are, as has already been pointed out, taxes in every sense of the word, and being taxes they are subject to the constitutional limitations imposed upon the taxing power, whenever these limitations extend to all taxes. The difference between a license and a license tax has been clearly pointed out by the courts in those cases where they have been called upon to construe grants of power to license. In these cases it has been uniformly held that a grant of power to license does not include the power to require a license tax but confers the power merely to require a license for the purpose of regulation under the police power, and that the fees exacted in that connection cannot exceed the cost of regulation.

State v. Smith, 35 *Atl.* 506 (*Conn.*) 52 *Am. St. Rep.* 301;

Sunset Telephone & Telegraph Co. v. City of Medford, 115 *Fed.* 202;

In re Laundry Licenses, 22 *Fed.* 701;

Clark v. Brunswick, 43 *N. W. Law.*, 175;

Gache County v. Jensen, 61 *Pac.* 303.

It is needless to further discuss this proviso contained in Section 3 of the Organic Act, for in no event can it have any effect upon the principal

point under discussion. That does not deal with the power of the legislature to levy license taxes as such, but deals with the power of the legislature to levy license taxes without regard to the question of whether the taxes so levied are uniform upon the same class of subjects, are assessed according to the actual value of the thing taxed and do not exceed in amount one per cent. upon the assessed valuation if levied for territorial purposes.

Section 9 of the Organic Act provides that all taxes must conform with these requirements, and it also contains a provision that all legislation, or attempts at legislation, that do not conform to the requirements of that section, shall be void.

This provision requires us to construe section 9 by itself, and having found that the legislation in question does not conform to the provisions of that section, such legislation cannot be otherwise than void.

The proviso contained in section 3, which has been previously discussed, of course, in no sense validates a tax laid in violation of the express provisions of section 9 in the face of the mandate contained in section 9 that all legislation, or attempts at legislation, not in conformity with the provisions of that particular section, must be regarded as void.

Nor can there be any doubt as to the intention

of Congress with reference to this matter when the Organic Act as a whole is considered.

Section 9 contains a provision that no tax shall be levied for territorial purposes in excess of one per cent and the further provision that no tax shall be levied for municipal purposes in excess of two per cent. Obviously these provisions were inserted to protect the people of Alaska against over-taxation, not merely to protect them against excessive property taxes.

The mischief which Congress desired to guard against was over-taxation in any form not over-taxation in this or that particular form. Over-taxation is as great an evil when it results from one form of taxation as it is when it results from another form.

If it had been the intention of Congress that license taxes might be collected without regard to the question of whether they complied with the limitations placed upon the taxing power, under the provision of section 9, provision would have been made for definite limitations upon the exercise of the power to lay such taxes. Congress would not have been so extremely solicitous of protecting the people of the territory against any excessive property tax, if it were the intention to permit the assessment of license taxes without restraint and without limitation.

There is no reason why property should be

protected in this regard if industry is to go entirely unprotected.

Furthermore, if it were held that license taxes could be imposed without restriction, the entire object of Congress in this regard could be evaded by laying an excessive tax on the business in which the property sought to be taxed was employed and thus the legislature could do in an indirect manner that which it could not do directly.

Under the present law in the territory, no property tax whatsoever is collected, the entire revenue for the use of the territory is collected by means of license taxes. There is no way of telling whether the amount of these taxes assessed on the business exceeds one per cent. of the value of the property employed in such business, because no assessment of such property is made.

If, therefore, the decision of the Circuit Court of Appeals is correct, the limitations placed by Congress upon the taxing power with so much precision and so much care have been entirely wiped away and set aside.

Section 9 of the Organic Act also contains the following provision:

> "Nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

This provision also becomes entirely ineffective if taxes can be imposed upon industries without

limitation and without restraint. Practically all of the Alaska fisheries and most of the larger mines are owned by non-residents of the Territory. No property tax is levied in the Territory nor is any substantial license tax collected, except from the mines and fisheries, so that the property of these non-residents is indirectly required to pay nearly all of the expense of the government within the Territory.

Clearly, Congress did not insert in the Organic Act, the provision against the over-taxation of non-residents with a view that it should be evaded in this manner.

Again, viewing the Organic Act as a whole, it will be observed that the limitations placed upon the taxing power not only are more rigid and exacting than those found in the organic act of any other territory or the constitution of any of the states, but the legislative powers conferred upon the territorial legislature are everywhere limited and circumscribed. The sparsely settled condition of the Territory, its vast extent and other peculiar conditions not met with elsewhere, are the reasons that suggest themselves for thus limiting the power of the legislature.

A further reason is found in the fact that the representation in the legislature is not made to depend upon the population or wealth of the districts from which the members are elected, but

each judicial division is given the same representation. The industries carried on in the Territory are such that each is carried on in its own particular locality and not elsewhere, at least to any extent, so that a license tax on any industry falls on the particular locality only in which that industry is carried on. Hence, the temptation of working for and voting for a license tax on an industry not carried on in his own division is constantly held out to each member of the legislature. In addition to this, it must be observed that the industries required to pay the license tax are those in which few, if any, of the members of the legislature have any personal or pecuniary interest, so that under the present system the members of the legislature who are called upon to expend the money raised by taxation pay no portion of the taxes and contribute nothing to the amount expended. Every incentive to economy is thus done away with and every inducement to extravagance is held out.

As an evidence of how this system operates, it is but necessary to direct attention to the appropriations made by the last territorial legislature, which was in session in the spring of 1917, and which appropriated approximately $1,500,000.00.

It is but reasonable to assume that Congress had all of these matters in mind when it placed in the Organic Act the limitations upon the taxing

power and that these limitations, exacting though they may be, reflect in the broadest sense the wisdom of Congress and are such that they should be given full force and effect.

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in Error.

IN THE

Supreme Court of the United States

ALASKA PACIFIC FISHERIES,
a Corporation,
Plaintiff in Error.
v.
TERRITORY OF ALASKA,
Defendant in Error.

No. 387

INDEX

	Page
Statement of the Case	5
Argument on Motion to Dismiss Writ of Error	6
Whether or not the Act of the Territorial Legislature Denies to Plaintiff in Error the Equal Protection of the Laws	24
Whether the Act of the Territorial Legislature Violates the Provisions of the Organic Act	30
Whether the Tax in Question is a License or a Specific Property Tax	47

CITATIONS

Alaska Pacific Fisheries v. Territory of Alaska, 236 Fed. 52	30, 31, 44
American Harrow Co. v. Shaffer, 68 Fed. 750	26
America Security & Trust Co. v. Commissioners of the District of Columbia, 224 U. S. 491	19, 20
American Sugar Refining Co. v. New Orleans, 181 U. S. 277	9, 14, 15
Aztec Mining Co. v. Ripley, 151 U. S. 79	11 12
Banger's Appeal, 118 Pa. St. 79	38
Banker's Mutual Casualty Co. v. Minneapolis, St. P. & St. Ste. M. R. Co., 192, U. S. 371	9
Bayley v. General Fire Extinguisher Co., 53, L. Ed. 605	9
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232	28
Bernarr McFadden v. U. S. 53 L. Ed. 801	9, 14, 15
Binns v. U. S., 194 U. S. 486	31
Borgmeyer v. Idler, 159 U. S. 408	10, 18
Cary Mfg. Co. v. Acme Flexible Clasp Co., 187 U. S. 427	9

CITATIONS — (Continued) Page

Christianson v. King County, 239 U. S. 356..... 15, 17
Church of Holy Trinity v. U. S. 143 U. S. 457... 20
City of Brookfield v. Toory, 43 S. W. 387..... 39
City of New Orleans v. Dubarry, 39 Am. St. Rep. 273 27
Cotting v. Kansas City Stock Yards Co., 193 U. S. 111 27
Davis v. Mayor and Council of Macon, 37 Am. Rep. 60 ..... 27, 49
Ellis v. Frazier, 63 Pac. 642..... 39
Ex parte Hurl, 49 Cal. 557..... 41
Ex parte Lemon, 77 Pac. 455..... 26
In re Garfinkle, 80 Pac. 188 42
In re Martin, 64 Pac. 43..... 42
In re Tax Delinquency in St. Louis County 73 N. W. 970 40
In re Yot Sang, 75 Fed. 983..... 25
John J. Sesnon Co. v. U. S. 182 Fed. 573..... 31
Johnson v. Mayor, 62 Ga. 645..... 50
Lincoln Gas Co. v. City, 182 Fed. 927 25
McGhee v. State, 73 S. E. 276 41
Merchants & Manufacturers' National Bank of Pittsburg v. Commonwealth of Pennsylvania, 167 U. S. 461 28
Morrill v. State, 38 Wisc. 428 42
Munn v. Ill., 94 U. S. 113 47
Ohio Railroad Commission v. Worthington, 225 U. S. 101 17
People v. Coleman, 60 Am. Dec. 581 41
Pittsburgh, Cincinnati & St. Louis R. Co. v. Ohio, 30 N. E. 435..... 39
Robinson v. Caldwell, 165 U. S. 359 10
Standard Oil Co. v. Commonwealth, 82 S. W. 1020 38
Standard Oil Co. v. Fredericksburg, 56 S. E. 817.. 26
Standard Underground Cable Co. v. Attorney General 19 Atl. 733 42
State v. Bixman, 62 S. W. 828 42
State v. French, 41 Pac. 1078 42
State v. Hammond Packing Co., 34 So. 368..... 27, 28, 42
State v. McKinney, 74 Pac. 1095 26
Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397 ..... 13, 14, 15, 16
Steamer Coquitlam v. U. S., 163 U. S. 346 13
Terre Haute v. Kersey, 64 N. E. 469..... 45
Weaver v. State, 15 S. E. 840..... 41
Wiggins Ferry Co. v. East St. Louis, 102 Ill, 560. 42
Willis v. Standard Oil Co., 52 N. W. 652 40

IN THE

Supreme Court of the United States

No. 387

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

v.

TERRITORY OF ALASKA,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF DEFENDANT IN ERROR

GEORGE B. GRIGSBY,
Attorney General of the
Territory of Alaska.

EMPIRE PRINTING COMPANY
JUNEAU, ALASKA

Supreme Court of the United States

ALASKA PACIFIC FISHERIES,
a Corporation,
Plaintiff in Error.

v.

TERRITORY OF ALASKA,
Defendant in Error.

No. 387

STATEMENT OF THE CASE

This is an action brought by the Territory of Alaska to recover taxes claimed to be due from the plaintiff in error under an Act of the Territorial Legislature of the Territory of Alaska.

The case was brought originally in the United States District Court for the District of Alaska, First Division. Judgment was rendered in said Court in favor of the Territory and thereupon a writ of error was sued out to the Circuit Court of Appeals for the Ninth Circuit. The judgment of the lower Court was affirmed by the Circuit Court of Appeals. Thereafter a petition for a writ of certiorari was filed in the Supreme Court by the plaintiff in error, which has been denied. Subsequently, and within the time allowed by law, a writ of error was sued out to this Court.

On the trial of this case in the lower Court, certain questions were raised which involved the construction and application of the Constitution of the United States and the constitutionality of the

law of the Territorial Legislature imposing the tax sought to be recovered. A motion has been filed in this Court by defendant in error to dismiss the case for want of jurisdiction. This motion has been presented upon written briefs and the Court has ordered further argument thereon in connection with the hearing on the merits.

ARGUMENT

I.

ON MOTION TO DISMISS WRIT OF ERROR

Section 134 of the Judicial Code provides that:

> "Section 134. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases writs of error and appeals shall lie from the District Court for Alaska, or from any Division thereof, to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders, and decrees of said Court shall be final in all such cases."

Section 247 of the Judicial Code provides that:

> "Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the District Court for the District of Alaska, or for any Division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in

all cases which involve the construction or Application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

It is the contention of plaintiff in error that, since this cause is one which involves the construction and application of the Constitution of the United States, it could have been taken direct to the Supreme Court of the United States by writ of error, and is therefore expressly excepted by the terms of Section 134 from those cases in which the decision of the Circuit Court of Appeal is made final.

Such a construction, and we concede that the language of Section 134 is susceptible of it, would lead to results so at variance with the intention of Congress and the aim and purpose of the Circuit Court of Appeals Act as to be absurd.

The aim and purpose of the Circuit Court of Appeals Act was to relieve the congestion of litigation in the Supreme Court by a distribution of jurisdiction. Is it consistent with this aim and purpose, or reasonable to suppose that it was the intention of Congress, that the right to successive appeals should exist in cases arising in Alaska which would not exist in the same class of cases or-

iginating in the District Courts of the United States?

Section 128 of the Judicial Code provides that:

> "Sec. 128. The Circuit Courts of Appeal shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in Section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in Sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the copywright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

This District Court of Alaska is a Court of general jurisdiction in civil, criminal, equity and admiralty cases, also having the jurisdiction of Circuit and District Courts of the United States.

A case exactly similar to this one might arise in any of the District Courts of the United States by reason of diversity of citizenship, and if constitutional questions should arise during the trial,

the judgment of the Circuit Court of Appeals would be final on appeal or writ of error.

In all cases arising in the District Courts of the United States under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in all admiralty cases, and in all ordinary cases of a civil nature in which diversity of citizenship is the sole ground of jurisdiction, the judgment of the Circuit Court of Appeals is final, even though constitutional questions may have arisen during the trial which would have warranted an appeal to, or writ of error from, the Supreme Court.

Many cases were cited in our opening brief to sustain this contention and are again listed for convenience, as follows:

Bernarr McFadden v. U. S., 53 *L. Ed.* 801;

American Sugar Refining Co. v. New Orleans, 181 *U. S.* 277; 45 *L. Ed.* 859;

Bagley v. General Fire Extinguisher Co., 53*L. Ed.* 605;

Carey Mfg. Co. v. Acme Flexible Clasp Co., 187 *U. S.* 427;

Spencer v. Duplan Silk Co., 191 *U. S.* 526;

Bankers' Mutual Casualty Co. v. Minneapolis, St. P. & St. Ste. M. R. Co., 192 *U. S.* 371;

Borgmeyer v. Idler, 159 *U. S.*, 408;

Robinson v. Caldwell, 165 *U. S.* 359; 41 *L. Ed.* 745.

Counsel for plaintiff in error contends for a construction of Section 134 of the Judicial Code which would put in force exactly the opposite rule in cases arising in Alaska. If his contention is sound, then in all cases arising in Alaska, of every kind and description, either under the patent laws, criminal laws, copyright laws, revenue laws, admiralty laws, in all civil suits in which the amount in controversy is $1,000, besides costs, the aggrieved party is entitled to successive appeals, to have the case reviewed first in the Circuit Court of Appeals and, if the result there be unfavorable, then again in the Supreme Court, the only condition of this right being that some question arise some time during the progress of the cause which involves the construction or application of the Constitution of the United States.

As stated before, this construction is contrary to the aim and purpose of the Circuit Court of Appeals Act. It is utterly opposed to the policy and theory of the cases cited above, interpreting Section 128 of the Judicial Code, with reference to the finality of judgments of the Circuit Court of Appeals in cases from the District Courts of the United States.

It is also absolutely inconsistent with the pre-

vious legislation of Congress respecting the finality of judgments of the Circuit Court of Appeals in cases arising in the Territories.

Section 15 of the Judiciary Act of March 3, 1891 (Circuit Court of Appeals Act), is as follows:

> "Sec. 15. That the Circuit Courts of Appeal, in cases in which the judgments of the Circuit Courts of Appeal are made final by this Act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the Supreme Courts of the several Territories as by this act they may have to review the judgments, orders and decrees of the District Courts and Circuit Courts, and for that purpose the several Territories shall, by the orders of the Supreme Court to be made from time to time, be assigned to particular circuits."

In *Aztec Mining Co. v. Ripley*, 151 U. S. 79, this Court said:

> "The Circuit Court of Appeals has no jurisdiction to review on appeal or error a judgment or decree of the Supreme Court of a Territory in a case which is 'not a case in admiralty, nor a case arising under the criminal, revenue or patent laws of the United States, nor a case between aliens and citizens of the United States or between citizens of the different States, for such case does not apply to either of the classes defined by Section 6 as

cases in which the judgments or decrees of the Circuit Court of Appeals should be final.' "

"Only in cases in which the judgments of the Circuit Court of Appeals are made final by the Judiciary Act of March 3, 1891, can that Court review the judgments of the Supreme Court of a Territory."

Syllabus, Aztec Mining Co. v. Ripley, 151 *U. S.* 79.

Nothing could be more indicative of the intent of the Act to distribute jurisdiction. The line of division is definite and clear.

Section 5 of the Act (Section 238, Judicial Code,) defines the cases appealable directly to the Supreme Court.

Section 6 of the Act (Section 128, Judicial Code) defines the appellate jurisdiction of the Circuit Court of Appeals and expressly designates the class of cases in which the judgments of the Circuit Court of Appeals are final.

Section 15 of the Act, above quoted, limits the appellate jurisdiction of the Circuit Court of Appeals to review the judgments of the Supreme Courts of Territories to those cases in which the judgments of the Circuit Court of Appeals are made final by Section 6 of the Act.

Furthermore, construing Section 15 of the Judicial Code, this Court said:

"The District Court of Alaska is to be

regarded as the Supreme Court of that Territory, within the meaning of the fifteenth section of the Act of March 3, 1891, and of the order of this Court assigning Alaska to the Ninth Circuit."

Steamer Coquitlam v. U. S., 163 *U. S.* 346.

Therefore, the judgments of the Circuit Court of Appeals were made final in all cases from Alaska reviewable by that Court.

Must Section 134 of the Judicial Code be construed to manifest the intention of Congress to go to the opposite extreme and to provide for successive appeals in all cases from Alaska involving constitutional questions? It seems to us that Section 134 should be construed with regard to the provisions of Section 247 and in accord with the aim and purpose of the Act and of previous legislation for the Territory.

The line of division between the appellate jurisdiction of the Supreme Court and that of the Circuit Court of Appeals is plainly expressed in Sections 134 and 247 of the Judicial Code, and no confusion would result except for the fact that this case involves both questions involving the construction and application of the Constitution of the United States, and other questions, so that, under authority of *Spreckles Sugar Refining Co. v. Mc-*

Clain, 192 U. S. 397, an appeal or writ of error might lie to or from either Court.

In harmony with *U. S. v. McFadden*, and the numerous other cases above cited, plaintiff in error, having elected to have this case reviewed in the Circuit Court of Appeals, is bound by the judgment of that Court.

On page 6 of the brief of the plaintiff in error, on the motion to dismiss the writ of error, is the following:

> "It has always been the policy of Congress to leave matters relating to the construction or application of the Constitution of the United States to this Court. If the decisions of two separate courts were made final upon matters requiring the construction or application of the Constitution of the United States, two separate lines of decision would soon arise with reference to the effect of that instrument.
>
> "The Constitution would ere long mean one thing in one Court and another thing in another. Owing to the peculiar fitness of this Court as the highest tribunal in the land, to pass upon all matters relating to the construction and application of the National Constitution, is has been the settled policy of Congress to leave such matters in all cases to the final judgment of this Court."

In support of this statement, counsel cites "*American Sugar Refining Company v. New Orleans*, 181 U. S. 277, *Spreckles Sugar Refining Com-*

pany v. McClain, 192 U. S. 307, and *Christianson v. King County*, 239 U. S. 356.

None of the cases cited bear out the contention of plaintiff in error.

In *American Sugar Refining Company v. New Orleans*, the Chief Justice says:

> "The jurisdiction of the Circuit Court rested on diverse citizenship and not on any other ground, and had the Circuit Court of Appeals gone on and decided the case, its decision would have been final and our interposition could only have been invoked by certiorari. This was so notwithstanding one of the defenses was the unconstitutionality of the ordinance."

In that case, the Circuit Court of Appeals had declined to take jurisdiction on the ground that constitutional questions had arisen after the jurisdiction of the Circuit Court attached.

In *Spreckles Sugar Refining Company v. McClain*, cited by counsel, this Court allowed the writ of error to the Circuit Court of Appeals for the reason that the jurisdiction of the lower Court was invoked on two grounds: First, because it was a revenue case and, second, because it arose under the Constitution and laws of the United States.

In *U. S. v. McFadden*, cited above, this Court comments upon the *Spreckles* case as follows:

> "But it is argued that the right to this

writ of error is supported by the decision of this Court in *Spreckles Sugar Refining Co. v. New Orleans*, 192 U. S. 397. An examination of that case, however, shows that the exact decision has no relevancy to the question now before us. The language of the opinion should be interpreted in the light of the facts of the case. The plaintiff there brought an action against the Collector of Internal Revenue to recover certain taxes imposed by the revenue laws of the United States, paid by it under protest. The plaintiff's claim, as stated in its declaration, was twofold. First, that the taxes were not due under the Act as properly construed, and, second, that the Act itself was unconstitutional. The jurisdiction, therefore, of the Trial Court was invoked upon two grounds: First, because it was a revenue case and, second, because it arose under the Constitution and laws of the United States, which means that plaintiff's case thus arose (citing *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149.")

On page 410 of the opinion in the *Spreckles* case, this Court says:

"The judgment of the Circuit Court of Appeals is not final within the meaning of the sixth section of the Act, in a case which although arising under a law providing for internal revenue and involving the construction of that law, is yet a case also involving from the outset, from the plaintiff's showing, the

construction or application of the Constitution or the constitutionality of an Act of Congress."

It is evident that the Spreckles case in no way conflicts with the cases heretofore cited by defendant in error.

In *Christianson v. King County*, cited by counsel, it was held that the decision of the Circuit Court of Appeals was not final for the reason that the jurisdiction of the Court below did not depend solely upon the citizenship of the respective parties but that it appeared from the amended bill or complaint that the controversy involved the construction of Amendments 5 and 14 of the Constitution of the United States and of an Act of Congress prescribing the authority of the Territorial Legislature. This case is also in harmony with the cases cited in support of the motion to dismiss the writ of error.

The only other case cited by counsel for plaintiff in error is *Ohio R. R. Commission v. Worthington*, 225 U. S. 101.

This case is also a case in which the jurisdiction of the Federal Circuit Court rested on two grounds, one being diverse citizenship, the other ground involving alleged infractions of the Federal Constitution.

Counsel for plaintiff in error fails to make any distinction between cases in which the juris-

diction of the trial court was invoked upon constitutional grounds and those cases in which constitutional questions arose during the trial. In the former class of cases this Court has always held that the decision of the Circuit Court of Appeals is not final, and in the latter class has always uniformly followed the rule expressed in *Borgmeyer v. Idler*, 159 U. S. 408, as follows:

> "Other questions subsequently arising in a case in which the jurisdiction of the Federal Court depends at the commencement of the action upon the citizenship of the parties cannot give appellate jurisdiction to the Supreme Court to review the judgment of the Circuit Court of Appeals."

This Court has uniformly held that in order for a constitutional question to prevent the judgment of the Circuit Court of Appeals being final, it must be such a question as wholly or partially vested the trial court with jurisdiction in the first place.

We believe we have demonstrated that the construction of the statute in question contended for by plaintiff in error is inconsistent with the aim and purpose of the Circuit Court of Appeals Act, in that it places a burden upon the Supreme Court which it is not called upon to bear, either in cases from United States District Courts or from any other Territory; that such a construction is incon-

sistent with the judicial decisions of this Court construing Section 128 of the Judicial Code with reference to the finality of judgment in the Circuit Court of Appeals in cases from the United States District Courts; that it is inconsistent with, and entirely opposite to, the theory of previous legislation limiting the jurisdiction of the Circuit Court of Appeals over cases arising in the Territories, including Alaska, to those cases in which the judgments of that Court are final.

We contend, on the contrary, for a construction in harmony with the aim and purpose of the Circuit Court of Appeals Act; in accord with the decisions of this Court interpreting Section 128 of the Judicial Code and the previous legislation governing cases from Alaska, and maintain that such a construction, though perhaps not so narrow and literal as that contended for by plaintiff in error, does no violence to the language of the Act.

In *American Security & Trust Co. v. Commissioners of the District of Columbia*, 224 U. S. 491, 56 L. Ed. 857, a similar question was decided by this Court, construing the sixth sub-division of Section 250 of the Judicial Code, which gives the Supreme Court jurisdiction to re-examine any final judgment of the Court of Appeals of the District of Columbia in cases in which the construction of any law of the United States is drawn in question by the defendant.

The Court says:

> "Of course there is no doubt that the special Act of Congress was, in one sense, a law of the United States * * * but all cases in the District arise under Acts of Congress and probably it would require little ingenuity to raise a question of construction in almost any one of them. If, then, the words have the meaning given them by the applicant, the appellate jurisdiction of this Court has been largely and irrationally increased. We believe Congress meant no such result.
>
> "A well known example of construing the statute not to include a case that indisputably was within its literal meaning but was believed not to be within the aim of Congress is *Church of the Holy Trinity v. U. S.* 143 U. S. 457."

So, in this case, if the words in question have the meaning given them by counsel for plaintiff in error, "the appellate jurisdiction of this Court has been largely and irrationally increased" over cases arising in Alaska and decided in the Circuit Court of Appeals.

We contend for the construction which limits the appellate jurisdiction of this Court as the same was limited by Section 15 of the Circuit Court of Appeals Act; that is, we maintain that the judgment of the Circuit Court of Appeals is final in all cases arising in Alaska.

Section 134 provides:

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in Section two hundred forty-seven * * * writs of error and appeals shall lie from the District Courts for Alaska * * * to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders and decrees of said Court shall be final in all such cases."

"In all such cases" the judgment of the Circuit Court of Appeals shall be final.

What cases? The answer is obvious. All cases reviewable in the Circuit Court of Appeals.

Counsel for plaintiff in error contends that the language means "the judgments, orders and decrees of the Circuit Court of Appeals in Alaska cases shall be final in all cases other than those in which an appeal will lie direct to the Supreme Court," and not final in cases where an appeal could have been taken direct to the Supreme Court, but this construction contradicts the very language of the section. The latter class, that is, cases appealable to the Supreme Court, are not by the terms of the section appealable to the Circuit Court of Appeals. Section 134 makes two classes of cases cognizable in the Circuit Court of Appeals. First, those not cognizable in the Supreme Court, and,

second, criminal cases. This case was cognizable in the Circuit Court of Appeals because, and only because, it was not cognizable in the Supreme Court as to the questions in controversy entitling it to be heard in the Circuit Court of Appeals. Involving both classes of questions, however, it could, under authority of the *Spreckles* case, cited above, have been appealed to either Court. But in harmony with the rule laid down in *McFadden v. U. S.* and the other cases decided by this Court interpreting Section 128 of the Judicial Code, in similar situations the appellant is compelled to elect the appellate tribunal and be bound by its judgment..

We suggest that the following be adopted as the proper construction of Section 134:

> The Circuit Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of error and appeal final judgments and decrees of District Courts of Alaska in all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in Section 247, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, and the judgments, orders and decrees of said Court shall be final in all cases so reviewable therein.

This construction is in accord with all the decisions above cited and in harmony with the

spirit of the Circuit Court of Appeals Act and the apparent intention of Congress to prevent, rather than encourage, successive appeals; to limit, rather than enlarge, the appellate jurisdiction of the Supreme Court.

It was not the intention of the Judiciary Act, as suggested by counsel for plaintiff in error, that in all cases from Alaska involving constitutional questions the Circuit Court of Appeals is to be regarded as an intermediate tribunal and that successive appeals, first to the Circuit Court of Appeals and then to the Supreme Court, be allowed. Litigants, on the contrary, in cases appealable to either Court should be compelled to select and abide the judgment of the appellate tribunal chosen. This would be required in a similar case from any of the United States District Courts proper. How much more reason, then, for this policy in Alaska, where the prevailing party is already compelled to defend his judgment at almost prohibitive expense of time and money in an appellate Court sitting thousands of miles distant, protracting considerably the usual period of the law's delay, and necessitating, in practically every instance, the employment of expensive counsel outside the Territory.

The burden on litigatants, in addition to the burden on this Court, is a consideration which affords a most cogent reason why it cannot be

considered that Congress intended to make the Circuit Court of Appeals an intermediate tribunal in this class of cases.

If the argument of this motion has been somewhat prolix, we assure the Court that it is because, in our opinion, the question of determining this case on this motion is of the gravest importance, involving the establishment of a precedent limiting the appellate jurisdiction of this Court in a large class of cases, and not because we approach with any lack of confidence a discussion of this case on the merits.

II.

ON THE MERITS

WHETHER OR NOT THE ACT OF THE TERRITORIAL LEGISLATURE UPON WHICH THIS PROCEEDING IS BASED DENIES TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS.

Plaintiff in error contends that by the Act in question a burden is imposed upon those engaged in fishing by means of fish traps which is not imposed on those engaged in fishing by means of seines, and that this discrimination is tantamount to a denial of the equal protection of the laws and

a violation of the Fourteenth Amendment to the Constitution.

In suport of this contention are cited:

Lincoln Gas Co. v. City, 182 Fed. 927;
In re Yot Sang, 75 Fed. 983.

The first of these cases holds that taxing the business of furnishing heat and light to a city by the use of gas, while the same business done with the use of electricity is not taxed, is a violation of the constitutional provision.

The second case holds to the same effect with reference to taxing laundries operated by hand $25.00 per annum, and laundries operated by steam $15.00 per annum.

While there is apparently no reason for the discrimination practiced in the above instances, it does not follow that no reason exists for taxing the business of fishing with fish traps and not that of fishing with seines. Neither is fishing with rod or spear made the subject of taxation.

By means of fish traps fish are caught on a stupendous scale. Indeed, it is a subject of general discussion in Alaska whether or not the use of fish traps had not best be altogether abolished as being so destructive of the supply of fish as to threaten depletion and thus deprive the people of the United States of a cheap and wholesome food. It will not be presumed that the Legislature had not this and

other considerations in mind in framing the Act.

The constitutional safeguard guaranteeing the equal protection of the laws has never been applied to the subject of taxation with such strictness as to result in making the expense of the collection of taxes greater than the revenue. No one would contend that the exemption of fish caught with rod or spear would be a denial of the equal protection of the laws. The same principle applies to the matter of fishing with seines. Both the latter modes of fishing are practiced by a very large number of people and it would be practically impossible to keep any check upon them, or upon the appilances used, for the purposes of taxation, without an expenditure far in excess of the amount of revenue that could be realized.

> "If all persons engaged in a particular business are classified for taxation according to natural and well-recognized lines of distinction, the constitutional requirement of uniformity is not violated."
>
> 25 Cyc. 607, citing
> *Ex parte Lemon*, 77 Pac. 455;
> *State v. McKinney*, 74 Pac. 1095;
> *Standard Oil Co. v. Fredericksburg*, 53 S. E. 817;
> *American Harrow Co. v. Shaffer*, 68 Fed. 750.
>
> "It is well settled that in imposing the

license tax, a classification for such tax according to the amount of business done or according to the amount of capital employed therein does not offend the constitutional provision which requires uniformity of taxation."

25 Cyc. 608, and cases cited.

It has been repeatedly held that the fact that one class of business is taxed and another is not, or that different businesses or avocations are taxed unequally, does not affect the validity or uniformity of the tax.

25 Cyc. 605, 606, and cases cited.

Davis v. Mayor and Council of Macon, 37 Am. Rep. 60;

City of New Orleans v. Dubarry, 39 Am. Rep. 273;

State v. Hammond Packing Co., 98 Am. St. Rep. 467.

In the latter case, the opinion quotes from *Cotting v. Kansas City Stock Yards Co.*, 193 U. S. 111, as follows:

"'So, again, exercising the undoubted right of classification it may often happen that some classes are subject to regulations and some individuals are burdened with obligations which do not rest upon other classes or other individuals similar situated. License taxes are imposed upon certain classes of business while others are exempt. It would practically defeat legislation if it was laid

> down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope or subject all to the same burdens. It would strip the Legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another, certain burdens imposed on one which do not rest upon the other.' "

And the Court, in the *Hammond* case, proceeds to say:

> "It is well settled that the provision for equality is not generally applicable to license taxes."

Mr. Justice Brewer, in *Merchants' & Manufacturers' National Bank of Pittsburg v. Commonwealth of Pennsylvania*, 167 U. S. 461, quotes from the opinion of this Court in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, as follows:

> " 'The provision in the 14th Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions, It may impose different specific taxes upon different trades and professions, and may

vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. *We think that we are safe in saying that the 14th Amendment was not intended to compel the States to adopt an iron rule of equal taxation.* If that were its proper construction, it would not only supercede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt.' "

The Circuit Court of Appeals answers the contention of plaintiff in error that the imposition of a tax on fish traps is a denial of the equal protection of the laws, as follows:

" 'This contention is answered by recognition of the fact that the power of Congress is ample in the premises, and as it had the power to provide that all persons catching fish by means of fish traps should pay a certain license tax and all persons catching fish by

seines should pay a different tax, the power transferred is not to be held invalid."

Alaska Pacific Fisheries v. Territory of Alaska, 236 Fed. 60.

In other words, the Circuit Court of Appeals held that Congress delegated to the Territory of Alaska the power to adopt the same license tax system as had heretofore been, and still is, in force in Alaska as a means of raising internal revenue, and it was decided by the Supreme Court in *Binns v. U. S.*, 194 U. S. 486, that in this regard Congress was not bound by constitutional restrictions in legislating for the Territory.

III.

WHETHER THE ACT OF THE TERRITORIAL LEGISLATURE VIOLATES THE PROVISIONS OF THE ORGANIC ACT.

The contention of plaintiff in error under this head is that the Act of the Territorial Legislature imposing certain taxes on business and trades violates the provisions of Section 9 of the Organic Act, which is as follows:

"All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value there-

of. No tax shall be levied for Territorial purposes in excess of one per centum of the assessed valuation of the property therein in any one year."

This proposition is fully and ably discussed by the Circuit Court of Appeals in *Alaska Pacific Fisheries v. Territory of Alaska*, 236 Fed. 52.

We will summarize as briefly as possible what we have to say in addition.

Congress, by the Act of March 3, 1899, amended June 6, 1900, adopted as the means of raising revenue for the support of the government of Alaska, a system of license taxation on business and trades. This system was adopted in lieu of property taxation on account of peculiar conditions existing in Alaska making the latter system inexpedient, expensive and cumbersome.

This Court, in *Binns v. U. S.*, 194 U.S. 486, held that Congress in thus legislating for the Territory did not violate Section 8 of Article I. of the Constitution, but had plenary power and was unfettered by constitutional restrictions as to uniformity, etc.

The Act of March 3, 1899, was also upheld in *John J. Sesnon Company v. U. S.*, 182 Fed. 573.

By Section 3 of the Organic Act of the Territory, being the Act of August 24, 1912, creating a Territorial Legislature for Alaska, the Territory was forbidden to alter, amend, modify or repeal

laws of Congress providing for taxes on business and trades.

Further limitations on the legislative power of the Territory are contained in Section 3 of the Organic Act, which have a bearing on its construction. Therefore, we will quote the portion containing them:

> "Provided that the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States, or to the game, fish and fur seal laws and laws relating to fur bearing animals in the United States applicable to Alaska, *or to the laws of the United States providing for taxes on business and trade*, or to the Act entitled, 'An Act to Provide for the Construction and Maintenance of Roads, Establishment and Maintenance of Schools, and Care and Support of Insane Persons in the District of Alaska, and for Other Purposes,' approved January 27, 1905, and the several Acts amendatory thereof. *Provided further, that this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses.*"

According to the law existing at the time of the passage of the Organic Act, all moneys derived from the tax on business and trades inside of incorporated towns was turned over to the city govern-

ments to be expended by them for school and municipal purposes.

In accordance with the Act of January 27, 1905, referred to in Section 3 of the Organic Act, above quoted, all moneys derived from taxes on business and trades outside of incorporated towns was applied as follows: Twenty-five per cent. for the maintenance of school outside of incorporated towns; five per cent. for the care of the insane; and seventy per cent. for the construction of roads.

By the Act of February 6, 1909, so much of the Act as provided for the expenditure of five per cent. of the license moneys collected outside of incorporated towns for the care and maintenance of insane persons was repealed and thereafter such five per cent. was applied to the establishment and maintenance of public schools.

It is apparent, therefore, that the reason Congress limited the power of the Territorial Legislature over the Congressional laws for taxes on business and trades was because they desired to preserve their control and protection of the Government schools and the construction of Government roads. It has been shown that none of the moneys derived from license taxes was devoted to the general expenses of governing the Territory, but all was applied to the particular purposes designated above; that is to say, since the passage of the Act appropriating these moneys to these particular pur-

poses. A very light tax was deemed sufficient for these purposes.

With the intention of preserving intact the Congressional supervision of schools and Government roads, Congress expressly forbade the Legislature to amend its laws creating a tax on business and trades. Having effected this purpose, the last proviso in Section 3 of the Organic Act was added, as follows:

> "This provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

It is significant that this latter proviso was added in the Senate after the bill left the House, then later consented to by the House.

Now, it is evident—

First. That it occurred to the Senate that the limitation on the power of the Legislature with reference to the Business and Trade License Act might be construed to prevent the Territory imposing any license taxes whatever. No other reason can account for expressly granting the Territory the power to impose other and additional taxes and licenses.

Second. That this proviso permitting the taxing of business and trades was not intended as a grant under the police power for the purpose of regulation, because such power is granted by Section 9 of the Organic Act in the words, "Legislative

power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States." Plainly, no one would construe the limitation on the power of the Legislature to amend the Congressional Business and Trade License Act as affecting this police power. Consequently, it is evident that Congress intended the proviso as an express grant to the Legislature of the power to impose a tax on business and trades as a means of raising revenue for general purposes.

And also, Congress must have intended that this power to tax should extend to the lines of business already taxed by the Government, and for two reasons:

First, for the reason that those lines of business already taxed were not taxed at all for purposes of general revenue but only for the creation of a special fund, as above shown.

Second, for the reason that to exempt the lines of business already taxed by Congress, which included nearly every industry and occupation known at that time as capable of bearing the burden of a tax, would have left the Territory with very little to work on, which would have been inconsistent with the apparent intention of Congress to afford the Territory a means of revenue.

It being apparent that Congress intended by

this proviso to grant to the Legislature the power to tax business and trades.

To tax them for the purposes of revenue and not under the police power for purposes of regulation.

To tax the same lines of business already taxed. as well as others.

And, since Congress had long exercised the power of taxing these subjects unrestricted by constitutional provisions, it follows that—

In delegating this power to the Territory, it was intended by Congress that the Territory should be to an equal degree unhampered and free from constitutional provisions as to unformity, within reasonable limits.

This conclusion being reached, none of the arguments advanced by plaintiff in error have any more application to the tax law passed by the Legislature than they would have had to the original tax law passed by Congress, which was, as remarked before, held valid in the *Binns* case.

Congress, therefore, either delegated to the Legislature the same power formerly exercised by itself or it delegated nothing by the proviso under consideration.

The only limitation placed upon the Legislature was that the tax imposed by Congress for municipal purposes, maintenance of schools and building of roads should remain intact.

But counsel for plaintiff in error argues that Section 9 of the Organic Act providing that all taxes shall be uniform and the assessments according to actual value applies to this license taxation. If so, it abolishes it. Uniformity in respect to occupation taxes and uniformity as to property taxes are unrelated. Occupation taxes never were based on assessment or valuation. They were not so based under the Congressional Act. When Congress, in a measure, relinquished Alaska from direct control and gave her a local government, it delegated to the local government all the powers formerly exercised by itself not expressly withheld, and expressly delegated its system of license taxation in its entirety.

That Section 9 of the Organic Act is not intended as any limitation upon the power of the Legislature to raise revenue by license taxation is further borne out by the fact that Section 9 is the general provision common to the organic acts of all the Territories in almost the identical terms.

The proviso contained in Section 3, however, is peculiar to Alaska.

Counsel for plaintiff in error has cited many cases to support the theory that the clause in Section 9 of the Organic Act providing that all taxes shall be uniform upon the same class of subjects and shall be assessed according to value applies not only to taxes levied directly upon property, but

also to licenses on business and trades imposed for purposes of revenue.

A few of the cases cited bear out the contention of plaintiff in error, but those decision are from States in which there is not constitutional authority for imposing license taxes for purposes of revenue. A great many of the cases cited, however, are not in point at all.

For instance, *Banger's Appeal*, 108 Pa. St. 79, held invalid a city ordinance which attempted to impose an occupation tax upon all officers, posts of profit, trades and occupations, based on the amount of yearly income arising therefrom, under authority of a legislative Act enacting

> "That it shall be lawful for cities of the third class to provide by ordinance for the assessment and collection of taxes, not exceeding one percentum upon the assessed valuation in any year, on all persons, real and personal property, and all other matters and things within the said respective cities taxable for State and county purposes."

It is apparent that the tax held illegal in this case was purely and simply an income tax and not authorized by the terms of the Act, and the court so held.

In *Standard Oil Co. v. Commonwealth*, 82 S. W. 1020, the tax in question was upheld as a police regulation, though the Court intimates in the opin-

ion that it would not have been constitutional if considered as a revenue measure.

In *Pittsburg, Cincinatti & St. Louis R. R. Co. v. State of Ohio*, 30 N. E. 435, the Act in question required every corporation or company operating a railroad, or any part of a railroad, within the State to pay the Commission of Railroads and Telegraphs a fee of $1.00 per mile for each mile of track operated by it within the State. This fee was not exacted as a condition of doing business or obtaining a license. The Court properly held this fee to be a direct tax on property not levied according to value nor uniform on all property in the State and consequently unconstitutional under the laws of the State.

In *City of Brookfield v. Toory*, 43 S. W. 387, it was held that under the constitutional uniformity clause of the State, a city ordinance levying a tax of one per cent. per annum upon the cash value of the stocks of merchants in the city was a property tax and not an occupation tax and therefore invalid because not uniform upon all the personal property of said city.

In *Ellis v. Frazier*, 63 Pac. 642, it was held that a statute imposing a tax of $1.25 on bicycles was not an occupation tax but a direct tax. This Act authorized the Board of County Commissioners to levy a special tax upon each bicycle within its jurisdiction, except such as were kept for sale.

Obviously, this was a property tax and did not purport to be a tax on any business or occupation and properly held unconstitutional as violating the uniformity clause in the Constitution of the State.

In *Willis v. Standard Oil Co.*, 52 N. W. 652, a statute authorizing the imposition of a fee for the inspection of illuminating oils was upheld as a police regulation.

In *In re Tax Delinquency in St. Louis County*, 73 N. W. 970, the Court held that an Act permitting mining companies to pay, in lieu of property taxes levied under the general tax law requiring uniformity and taxation according to value, certain specified amounts upon ore mined, to-wit, on copper, five cents per ton, and upon iron, one cent per ton, was a violation of a constitutional requirement.

It is apparent that none of the above decisions cited by plaintiff in error has the remotest relation to the question under consideration. But it is idle to discuss these or the other decisions cited of the various State courts holding certain taxes imposed unconstitutional by reason of the constitutional provisions of those States, because it is not the case, as stated in the brief of the plaintiff in error, that any of those States have similar laws with a similar history granting to their Legislatures the power to raise money by license tax. The law granting this power to Alaska is *sui generis*, adopt-

ed in the first place by Congress on account of the exceptional conditions existing in the Territory, and reenacted by the Legislature on account of the continuance of those conditions.

The contention of plaintiff in error amounts to this:

> "That whenever a constitutional requirement exists to the effect that taxes must be uniform and this requirement is not expressly limited in its application to property taxes but is unaccompanied by an express provision under which license taxes are exempted from its operation, the courts have held that the requirement applies to all taxes alike, including license taxes, as well as taxes upon property."

The Circuit Court of Appeals has stated in its opinion that many cases can be found to the contrary of this proposition. We cite the following:

> "The requirement in a State Constitution that taxation shall be uniform and equal refers particularly to the taxation of property and does not necessarily prohibit the imposition of a license tax on a business or avocation."
>
> *Ex. p. Hurl*, 49 Cal. 557.
> *People v. Coleman*, 60 Am. Dec. 581;
> *McGhee v. State*, 17 S. E. 276;
> *Weaver V. State*, 15 S. E. 840;

Wiggins Ferry Co. v. East St. Louis, 102 Ill., 560;
Terre Haute v. Kersey, 64 N. E. 469;
In re Martin, 64 Pac. 43;
State v. Hammond Packing Co., 34 So. 368;
State v. Bixman, 62 S. W. 828;
State v. French, 41 Pac. 1078;
Standard Underground Cable Co. v. Attorney General, 19 Atl. 733;
In re Garfinkle, 80 Pac. 188;
Morrill v. State, 38 Wisc. 428.

We consider further discussion of this proposition as unnecessary because—

Every objection that can be made to the tax in question on this ground could as well have been made to the license system adopted by Congress, which has been held by the courts not subject to these objections, and because we consider that Congress has, in effect, expressly exempted the license taxes which the Territory is authorized to impose from the operation of the uniformity clause of the Organic Act.

Since it has been clearly shown that it was the intention of Congress that the Territory should have the benefit of a system proven by actual test to be adapted to the needs of the Territory, it follows—

That Section 9 of the Organic Act providing

that "all taxes shall be uniform upon the same class of subjects and the assessments shall be according to the actual value thereof," was not intended to limit the proviso which expressly authorizes the license system.

It is not reasonable to suppose that Congress would emphasize a grant of power in the proviso with the intention of having the benefits to be derived from it utterly destroyed by the general provisions of the Act.

Viewing the proposition in this light, it is immaterial whether this cannery tax be viewed as an occupation tax or , as claimed by plaintiff in error, in effect a property tax. All taxes on business which has to do with manufacturing or selling goods, or even on occupations which do not, have been held in the last analysis to be property taxes, for in the former case, the tax must have a tendency to enhance the price of the goods or diminish the profit thereon, and in the latter, to either raise the price of the service or lessen the income of the trade or profession. But in the practical application of the terms, as generally understood and interpreted by the courts, a property tax is one imposed directly on property, while a business or occupation tax is one imposed on a pursuit or calling without regard to the use of property in connection therewith.

The point in this case is that Section 9 of the

Organic Act was not intended to apply to the license system.

In the cases cited by counsel, where such taxes have been held to be subject to similar constitutional provisions, the effect of the decision is invariably to do away with the license system, for obviously it is incapable of being adapted to statutes requiring uniformity, based on assessments according to value. In other words, these decisions hold that the license tax system itself is unconstitutional unless expressly authorized by the Constitution.

Our Organic Act, which is our Constitution, *does expressly authorize the license tax system.*

While the naked language of the pertinent sections of the Organic Act of Alaska leads irresistably to this conclusion, as is pointed out in the opinion of the Circuit Court of Appeals in *Alaska Pacific Fisheries v. Territory of Alaska*, 236 Fed. 58, we are not confined to the Act itself in construing the legislative intent.

By the Act of Congress, August 24, 1912, known as the Organic Act, Congress gave Alaska a Territorial form of government, with an elective Legislature, granting the power to the Territory to raise revenue by taxation. As was said by the Circuit Court of Appeals in the case above cited:

> "The history of the passage of the Organic Act shows that somewhat peculiar conditions were presented with respect to provid-

> ing for the fiscal needs of the Territory. No general property tax laws obtained. Revenue would have to be raised and naturally some scheme of license taxation of the extensive industries carried on in the Territory presented itself for adoption. * * * The Congressional records disclose that after discussion it was decided not to abridge too far the transfer of power in the Legislature to adopt its own scheme of levying taxes and licenses * * * Congress reserving to itself, by Section 20 of the Organic Act, the possible exercise of the power to nullify any law passed by the Territorial Legislature."

Theretofore all revenues collected by the Government for the expense of maintaining a government for Alaska were raised by a system of license taxation adopted by Congress on March 3, 1899, amended June 6, 1900 (Compiled Laws of Alaska, Section 2569; 31 Stat. at L. 331). Since the adoption of this system by Congress, not a dollar of revenue has been raised by a tax on property in Alaska, except in incorporated towns for municipal purposes..

The reasons which guided Congress in adopting this license method of taxation were the difficulties to be encountered and large expense incurred in pursuing any other method, owing to the vast area, sparse and widely scattered population and lack of transportation facilities.

When Congress passed the Organic Act of Alaska in August, 1912, the same condition existed, though in a lesser degree, but the transportation facilities were, and are still, inadequate, the population mostly residing in incorporated towns, while the bulk of assessible property of large value lay far outside of them. The Organic Act prohibits the Legislature from organizing a county form of government. For these several reasons, a revenue system based on real and personal property taxation was still inexpedient and impracticable. Consequently, while the Organic Act grants to the Territory the power of taxing property, it at the same time leaves it free to adopt the license tax system devised by Congress as best adapted to Territorial conditions.

Thus it is seen that this case involves the validity of the revenue system first devised by Congress for Alaska and upheld in the case of *Binns v. U. S.*, cited above, and later adopted by the Territorial Legislature, and which has been in active and successful operation for the past nineteen years.

We urge the Court to apply to this case the rule laid down by Chief Justice Waite:

> "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly

so. If there is doubt, the express will of the Legislature should be sustained."

Munn v. Ill., 94 U. S. 113.

IV.

WHETHER THE TAX IN QUESTION IS A LICENSE OR A SPECIFIC PROPERTY TAX

It is stated in support of this contention that the tax is specifically laid on fish traps; that a fish trap is not a line of business; that, in common parlance, the phrase "fish trap business" would be applied to the business of buying and selling fish traps; that the Circuit Court of Appeals erred in holding that the term "fish trap business" means fishing by means of fish traps.

We think the Circuit Court of Appeals was justified in attaching the meaning to these words which was given them by the trial court. It is a matter of common knowledge, in Alaska at least, that there is no such business as buying and selling fish traps. A fish trap is not bought and sold, but constructed by means of piling driven into the ocean bed, connected with the necessary means of obstructing the run of salmon. It is defined as a pen-trap. It is held by right of occupancy and at the present time a bill is pending before Congress to vest in the occupant a title limited for a certain period of

years and subject to the right of renewal, but granting no permanent title.

The Circuit Court of Appeals gave the statute imposing a license on fish traps the only meaning of which the language is susceptible.

In the opinion of the trial court in this case, this difficulty is disposed of as follows:

> "It is true there is no such business as fish traps, but this is a mere 'inaptitude of expression.'
>
> "The meaning is plain when the language is read in connection with that knowledge of the fishing business common to all our people and of which the Legislature will not be considered ignorant and of which the Court will take judicial notice. The Legislature meant that whoever conducts the business of fishing by means of fish traps must pay the license required by law.
>
> "Although taxation statutes are to be strictly construed against the taxing power, yet they are to be construed to mean something, if possible, and are not to have their vitality frittered away by technical refinements."

The Legislature has laid the tax on the business of fishing by means of fish traps, measuring the amount of the tax by the number of fish traps used. This method is not unusual under the license tax system. Under the license tax system put in

operation by Congress for Alaska, among the lines of business taxed were:

> "Ocean and coastwise vessels ..... cents per ton, net cubic measurement; quartz mills, ... per stamp; railroads, $100.00 per mile."

It has already been shown that the Legislature was empowered to impose the same kind of license taxes as Congress.

In *Davis v. Mayor and Council of Macon*, 37 Am. Rep. 60, a city ordinance was in question which imposed a license tax upon certain kinds of peddlers which was measured, in part, by the number of vehicles used in the business. In the opinion the Court says:

> "It is insisted further that by the tax upon the wagon, the *ad valorem* principle of the Constitution is violated. This objection proceeds upon the theory that the wagon is mere property, and subject only to State and county taxes. Complainants contend that having paid all taxes on the value of the wagon as property with which they are chargeable, they cannot be required to pay an additional specific tax to the city upon the same property. But, as already stated, the tax now in question is not a property tax but a business tax; the wagon is treated as an instrument used in carrying on the business of the complainants within the city, and it has been ruled, and no

doubt rightly ruled, that the number and kind of vehicles may be regarded in measuring a tax of this description. *Johnson v. Mayor*, 62 Ga. 645."

The fact that dummy traps were included by the Act does not mitigate a particle in favor of the contention that the tax was intended as a property tax. What was intended beyond all possibility of a doubt was to tax the fisheries. Dummy traps are used to hold trap sites for future fishing purposes and are an adjunct of the business. Their inclusion in the schedule, whether strictly proper or not, affords no inference of a contrary legislative intent. No tax on dummy traps, however, is sued for in this case.

Respectfully submitted,

GEORGE B. GRIGSBY,
Attorney General for the Territory of Alaska.

Supreme Court, U. S.
FEB 4 1918
JAMES D. MAHER
CLERK

In the

Supreme Court of the United States

No. 118

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

GEORGE B. GRIGSBY,
Attorney General for the
Territory of Alaska.

In the

Supreme Court of the United States

No. 388.

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
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Alaska Daily Empire Print

IN THE SUPREME COURT OF THE UNITED STATES.

No. 388.

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

Now comes the Defendant in Error, the Territory of Alaska, by George B. Grigsby, Attorney General, and moves this court to dismiss the writ of error herein for want of jurisdiction.

This motion is based upon all the records and files herein, and upon the grounds stated in the annexed brief and argument.

GEORGE B. GRIGSBY,
Attorney General for the
Territory of Alaska.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 388.

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

STATEMENT OF THE CASE.

This is an action originally brought by the Territory of Alaska to recover taxes claimed to be due from the plaintiff in error under an act of the Territorial Legislature of the Territory of Alaska. The case was brought originally in the United States District Court for the District of Alaska, First Division. Judgment was rendered in said court in favor of the Territory, and thereupon a writ of error was sued out to the Circuit Court of Appeals for the Ninth Circuit. The judgment of the lower court was affirmed by the Circuit

Court of Appeals. Thereafter a petition for a writ of certiorari was filed in the Supreme Court by the plaintiff in error, which has been denied. Subsequently and within the time allowed by law a writ of error was sued out to this court.

On the trial of the case in the lower court certain questions were raised which involved the construction or application of the Constitution of the United States and the constitutionality of the law of the Territorial Legislature imposing the tax sought to be recovered.

Defendant in error contends that the judgment of the Circuit Court of Appeals is final herein and that this court is therefore without jurisdiction.

BRIEF AND ARGUMENT.

The law defining the appellate jurisdiction of the Circuit Court of Appeals over cases arising in Alaska is set forth in section 134 of the Judicial Code of the United States (36 Stat. L. 1134) as follows:

> "Sec. 134. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed

five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals."

Section 247 of the Judicial Code (36 Stat. L. 1158) provides for the taking of appeals and writs of error from the District Courts of Alaska direct to the Supreme Court, as follows:

"Sec. 247. Appeals and writs of error may be taken and prosecuted from the final judgments and decrees of the district court for the district of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution

> or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs, of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the District Courts to the Supreme Court."

It is conceded that in this action a writ of error might have been taken direct to the Supreme Court from the judgment of the District Court of Alaska because of the constitutional questions raised by the demurrer of the plaintiff in error. Other questions, however, having arisen in the case than constitutional questions, the plaintiff in error elected to take its appeal to the Circuit Court of Appeals. The question now presented is: Was the judgment of the Circuit Court of Appeals final under the provisions of section 134 above quoted?

If no other than constitutional questions were raised in the court below the Supreme Court of the United States would undoubtedly have had exclusive appellate jurisdiction. There being other questions involved, however, the plaintiff in error had a right to elect to appeal either to the Circuit Court of Appeals or to the Supreme Court.

(*Bernarr McFadden vs. U. S.*, 53 *Law. Ed.* 801;

Amer. Sugar Ref. Co. vs. New Orleans, 181 *U. S.* 277; 45 *Law. Ed.* 859.)

Having elected to pursue the former course, is plaintiff in error bound by the judgment of the Circuit Court of Appeals, or may he sue out another writ of error to the Supreme Court?

The decisions construing section 128 of the Judicial Code (36 Stat. L. 1133), which defines the appellate jurisdiction of the Circuit Court of Appeals over the District Courts of the United States, throw much light upon the question. Section 128 is as follows:

> "Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

It has been repeatedly held by this court in

construing the above section that the judgment of the Circuit Court of Appeals is final in the class of cases enumerated, even though constitutional questions have arisen in the progress of the trial of a case which would have caused a writ of error to lie direct to the Supreme Court.

> "A judgment by the Circuit Court of Appeals in a case in which the jurisdiction of the District Court depended solely upon the fact that the case was one arising under the criminal laws of the United States is, by the very terms of the act of March 3, 1891, section 6, 'final' and is not reviewable in a Federal Supreme Court, although constitutional rights were invoked by the accused and the case might therefore, under section 5 of that act, have been brought directly from the district court to the Supreme Court."
>
> (*Bernarr McFadden vs. U. S.*, 53 *Law. Ed.* 801.)

Quoting from the decision above cited:

> "As this is a case arising under the criminal laws, the judgment of the circuit court of appeals, rendered within its lawful jurisdiction is, by the very terms of the act, final. And so it was held in Cary Mfg. Co. v. Acme Flexible Clasp Co., 187 U. S. 427, this court saying, through the chief justice: 'Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the

> denial of constitutional rights, and hence that this court has jurisdiction under section 5 of that act; but it is settled that, even if a party might be entitled to come directly to this court under that section, yet, if he does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court;' and the writ of error to the circuit court of appeals was accordingly dismissed."

See also Bagley vs. General Fire Extinguisher Co., 53 Law. Ed 605, to the following effect:

> "Jurisdiction below depends entirely upon diverse citizenship within the meaning of the act of March 3, 1891 (26 Stat. at L. 826), section 6, making judgments of the circuit courts of appeals final in such cases, where that is the only ground of jurisdiction disclosed by the complaint, although a Federal question may have been raised at the trial."

See also the following cases: Spencer v. Duplan Silk Co., 191 U. S. 526; Bankers' Mut. Casualty Co. vs. Minneapolis, St. P. & St. Ste M. R. Co., 192 U. S. 371.)

> "Other questions subsequently raised in a case in which the jurisdiction of the Federal circuit court depends, at the commencement of the action, upon the citizenship of the parties, cannot give appellate jurisdiction to the Supreme Court to review a judgment of the circuit court of appeals.
>
> (*Borgmeyer v. Idler*, 159 *U. S.* 408.)

It is apparent that in construing section 128, which defines the appellate jurisdiction over United States District Courts this court has uniformly held that in order for a constitutional question to prevent the judgment of the circuit court of appeals being final it must be such a question as wholly or partially vested the trial court with jurisdiction in the first place.

Undoubtedly the intent of the judiciary act of March 3, 1891, was that there should not be two appeals except where the decision of the circuit court of appeals is not made final, (Amer. Sugar Refining Co. vs. New Orleans, 181 U. S. 277); and the trend of the decisions is to prevent two appeals or successive appeals except where the statute clearly authorizes them.

> "It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals."
>
> (*Robinson v. Caldwell*, 41 *Law. Ed.* 745, 165 *U. S.* 359.)

The jurisdiction of the District Courts of Alaska is defined in section 363 Compiled Laws of Alaska, (35 Stat. L. 839), as follows:

> "There is hereby established a District Court for the District of Alaska with the jurisdiction of circuit and district courts

> of the United States and with general jurisdiction in civil, criminal, equity and admiralty causes," etc., etc.,

The jurisdiction of the lower court, then, in this case did not depend upon any of the jurisdictional facts which would have been necessary to entitle any one of the District Courts of the United States to jurisdiction in a similar case; and it must be conceded that in all cases above cited where the decision of the Circuit Court of Appeals has been held final this conclusion was arrived at on account of the provisions of section 128 of the Judicial Code, which expressly states that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states, also in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws and in all admiralty cases. In all such cases the judgment of the Circuit Court of Appeals is held to be final notwithstanding constitutional questions being involved which did not affect the jurisdiction of the court below. The cases are cited, however, to show the tendency of the court to prevent successive appeals, and no doubt this tendency will affect the judgment of this court in the construction to be placed upon

section 134 of the Judicial Code, which defines the appellate jurisdiction of the Circuit Court of Appeals in Alaska cases.

In suing out this writ of error, plaintiff in error relies upon section 241 of the Judicial Code of the United States (36 Stat. L. 1157) which is as follows:

> "Sec. 241. In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

Is or is not the judgment of the Circuit Court of Appeals in this case made final by the provisions of section 134 above quoted? If it is not, then the right to two appeals may exist in Alaska which would not exist in the same class of cases in the United States District Court in any one of the States. The case might be an ordinary civil suit between citizens of different States, or one arising under the patent, copyright or revenue laws, and provided it involved a constitutional question the judgment of the Circuit Court of Appeals would not be final but a further appeal would lie to the Supreme Court. We do not believe that section 134 should receive a construction which would bring about such a result if it is susceptible of any other construction.

The particular language of section 134 under discussion is

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States * * * writs of error and appeals shall lie from the District Court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases."

To take jurisdiction of this case this court must construe the above language to mean that in all cases in which a writ of error *might* have been taken to the Supreme Court the judgment of the Circuit Court of Appeals is not final. In other words, in any case in which a constitutional question arises, whether on the pleadings or during the course of the trial, an appeal or writ of error can be sued out to the Circuit Court of Appeals and again if the case is affirmed, to the United States Supreme Court.

We contend on the contrary, that the apparent intention of Congress was to prevent, rather than encourage, successive appeals, to limit rather than enlarge the appellate jurisdiction of the Supreme Court over cases from Alaska, and to make the judgment of the Circuit Court of Appeals final in all cases appealed to that court from the District of Alaska. We contend that the language "in all

cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States" should be construed simply as a limitation on the class of cases which may be taken to the Circuit Court of Appeals and that the statute having designated and limited the cases cognizable in the Circuit Court of Appeals the language "and the judgments, orders and decrees of said court shall be final in all such cases" should be construed to mean that the judgment of the Circuit Court of Appeals is final in all cases of the class so designated and limited which have been appealed to that court. This construction is both reasonable and in accord with the decisions above quoted, which manifest the intent of the judiciary act and tendency of this court to prevent successive and repeated appeals when not expressly and clearly allowed by the terms of the act.

Respectfully submitted,

GEORGE B. GRIGSBY,
Attorney General for the
Territory of Alaska.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 388.

ALASKA PACIFIC FISHERIES,
a corporation,
Plaintiff in Error,
vs.
THE TERRITORY OF ALASKA,
Defendant in Error.

NOTICE

To the Alaska Pacific Fisheries, a corporation, plaintiff in error, and to J. A. Hellenthal, its counsel.

You are hereby notified that the Territory of Alaska, the defendant in error herein, will submit to the Supreme Court of the United States, on Monday, the.....day of February, 1918, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, and that said

motion will be submitted upon all the records and files herein, and upon the foregoing statement of facts and brief and argument.

GEORGE B. GRIGSBY,
Attorney General for the
Territory of Alaska.

Service of the foregoing notice, motion, brief and argument is hereby accepted and acknowledged this ..... day of January, 1918.

.....
Counsel for plaintiff in error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 388.

ALASKA PACIFIC FISHERIES, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF ALASKA, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

Statement of Facts.

This action was brought to recover moneys claimed to be due the Territory of Alaska under the provisions of an act passed by the First Territorial Legislature, and referred to in the complaint as the act upon which the action is based. To this complaint a demurrer was interposed, on the ground, among others, that the act of the Territorial Legislature was void in that it was obnoxious to the provisions of the Constitution of the United States and the provisions of the organic

act of the Territory. The particulars in which the act violated the Constitution and the organic act were in each case pointed out in said demurrer. Other questions, which did not go to the validity of the act of the Territorial Legislature, but dealt with the defendant's liability thereunder, under the facts as stated in the complaint, were also raised by the demurrer and specifically pointed out therein. (See Record, page 6 *et seq.*) All these questions were duly presented to the lower court for consideration and determination, as appears from the bill of exceptions. (Record, page 6 *et seq.*)

The demurrer was thereupon duly overruled, and the defendant having elected to stand thereon and having duly excepted to the ruling of the court, a judgment was entered in favor of the Territory for the amount demanded, to wit: the sum of $3,496.45, exclusive of costs.

The case was thereupon taken to the Circuit Court of Appeals for the Ninth Circuit upon writ of error, where all the questions presented to the lower court were again presented for consideration and determination.

The judgment of the district court for Alaska was affirmed by the honorable Circuit Court of Appeals for the Ninth Circuit, and the various questions presented were decided against the plaintiff in error. (See opinion, Record, page 26, and opinion in the case of the *Alaska Mexican Gold Mining Company vs. Territory of Alaska*, 236 Fed., 64.) The last-mentioned case and the case at bar were argued and submitted together, and presented identical questions. Some of these were discussed by the Circuit Court of Appeals in the opinion in each case, but not repeated in both cases.

Whereupon the cause was taken to this court on writ of error.

The motion filed on behalf of the Territory presents the question as to whether or not this court has jurisdiction on writ of error to review the judgment of the Circuit Court of Appeals for the Ninth Circuit.

ARGUMENT.

Section 241 of the Judicial Code provides as follows:

> "In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

Since the case involves an amount in excess of one thousand dollars ($1,000), exclusive of costs, the only question open for discussion is whether or not the judgment of the Circuit Court of Appeals is made final by the terms of the Judicial Code.

Section 247 of the Judicial Code provides as follows:

> "Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska, or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize causes; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district courts to the Supreme Court."

Section 134 of the Judicial Code provides as follows:

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred

> and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals."

Since this case is one which involves the construction and application of the Constitution of the United States, it belongs to the class of cases mentioned in section 247 of the Judicial Code, in which appeals and writs of error may be taken from the district court of Alaska direct to the Supreme Court of the United States. If the case had been one involving no questions other than those which required the construction and application of the Constitution of the United States, this court would have had exclusive jurisdiction to review the judgment of the district court for Alaska, and the Circuit Court of Appeals would have had no jurisdiction in this regard; but the case was one which involved a number of other questions along with those involving the construction and application of the Constitution of the United States, so that under the authority of the case of *Spreckles Sugar Refining Company vs. McClain*, 192 U. S., 397, and other cases decided by this court, an appeal or writ of error might be taken out either to this court or to the Circuit Court of Appeals for the Ninth Circuit. The cause having been taken to the Circuit Court of Appeals, and there decided, it remains to be seen whether this court has jurisdiction to review it on writ of error directed to the Circuit Court of Appeals.

Section 134 of the Judicial Code provides that:

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases writs of error and appeals shall lie from the district court for Alaska, or from any division thereof, to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders, and decrees of said court shall be final in all such cases."

Under the terms of this act, therefore, the decision of the Circuit Court of Appeals is final in all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in section 247. But since this is a case in which a writ of error would lie to the Supreme Court of the United States, under the provisions of section 247, it is expressly excepted by the terms of the act from those cases in which the decision of the Circuit Court of Appeals is made final. The phrase "such cases" refers only to the cases dealt with by that section, and from this class those involving the construction and application of the Constitution of the United States are expressly excepted. The language of the act is not that the decisions of the Circuit Court of Appeals for the Ninth Circuit shall be final in "all cases" but in "such cases." The use of the word "such" limits the class of cases in which the decisions of the Circuit Court of Appeals are made final to the cases previously in the same sentence dealt with; and since the cases of the character dealt with in section 247, to which the case at bar belongs, are expressly excepted from those in which the decision is made final, the decision of the case at bar is not made final.

If it had been the intention of Congress that all decisions of the Circuit Court of Appeals should be final the language employed would have been to the effect that the orders, judgments, and decrees of such court should be final in all cases.

By employing the phrase "in all such cases," it is clear that Congress intended to limit the class of cases in which the judgments, orders, and decrees should be final to those previously designated, from which cases involving the construction or application of the Constitution of the United States were expressly excluded. And this is in accord with the settled rule of Congress upon that subject.

It has always been the policy of Congress to leave matters relating to the construction or application of the Constitution of the United States to this court. If the decisions of two separate courts were made final upon matters requiring the construction or application of the Constitution of the United States, two separate lines of decision would soon arise with reference to the effect of that instrument. The Constitution would ere long mean one thing in one court and another thing in another. Owing to the peculiar fitness of this court as the highest tribunal in the land, to pass upon all matters relating to the construction and application of the national Constitution, it has been the settled policy of Congress to leave such matters in all cases to the final judgment of this court. The decision of the Circuit Court of Appeals is not made final, and, the requisite amount being involved, it may be reviewed by this court under the provisions of section 241 of the Judicial Code.

American Sugar Refining Company vs. New Orleans, 181 U. S., 277.

Spreckles Sugar Refining Company vs. McClain, 192 U. S., 397.

Christianson vs. King County, 239 U. S., 356.

The case of *Macfadden vs. United States*, 213 U. S., 288, cited by the attorney general for the Territory, is not in point. That case originated in the district court of the United States, and arose under the criminal laws of the United States. In such cases the question of whether the judgment of the Circuit Court of Appeals is final depends

upon the source of jurisdiction, and is not determined by the nature of the case or the questions of law raised. In that case the source of jurisdiction was the criminal laws under which the case arose, and by the express language of section 128 of the Judicial Code, the decisions of the Circuit Court of Appeals in all cases arising under the criminal laws are made final. The question in such cases is not what is the character of the questions involved, but what is the source of jurisdiction, and, under the express language of the statute in cases where the source of jurisdiction is the criminal laws, the decisions are made final, independent of the further question of what questions may or may not have been raised at the trial. Even though a case were presented, therefore, that might have gone directly to the Supreme Court from the district court because it involved the construction and application of the Constitution, the decision of the Circuit Court of Appeals would be final if the case arose under the criminal laws, for the language of the statute is explicit that in cases where the source of jurisdiction is the criminal laws, the decision of the Circuit Court of Appeals is final, regardless of the character of the questions that may be involved. As was said by the court in the opinion (p. 294):

> "It is to be observed that the line of division between cases appealable directly to this court and those appealable to the Circuit Court of Appeals, made by section 5 of the act, is based upon the nature of the case or of the questions of law raised; but the line of division between cases appealable from the Circuit Court of Appeals to this court and those not so appealable, drawn by section 6, is different, and is determined, not by the nature of the case or the questions of law raised, but by the sources of jurisdiction of the trial court, namely, the circuit court or the district court, whether the jurisdiction rests upon the character of the parties or the nature of the case."

It was for this reason that the *Macfadden case* was clearly distinguishable from the case of the *Spreckles Sugar Refin-*

ing Company vs. McClain, supra, for, while in the last-mentioned case the revenue laws were one of the sources of jurisdiction, another source of jurisdiction was found in the fact that the plaintiff based his claim on the contention that the act under which the money sought to be recovered had been paid was unconstitutional. The last-mentioned contention, therefore, formed one of the sources of jurisdiction, and it was held that the writ of error could be maintained, as the jurisdiction of the trial court did not depend solely upon grounds which, by the terms of the act, would have made the judgment of the Circuit Court of Appeals final, but also depended upon grounds which would have permitted a writ of error from this court to the Circuit Court of Appeals.

The case was also different from the *Macfadden case* in that the constitutional questions raised in that case were raised in the course of the trial and were not such as to serve as a source of jurisdiction.

The provisions of section 247 and of section 134 of the Judicial Code, governing appeals and writs of error from the district court of Alaska, differ widely from the sections of the Judicial Code applicable to the *Macfadden case* and the case of the *Spreckles Sugar Refining Company vs. McClain, supra,* in that the finality of judgments of the Circuit Court of Appeals is not made to depend upon the sources of jurisdiction, but upon the character of the case. The district court of Alaska is a court of general law and equity jurisdiction and its judgments are reviewable without regard to the question of how the case arose. See *In re Cooper, Petitioner,* 143 U. S., 472.

Accordingly, under the provisions of section 134 of the Judicial Code, the question of what judgments of the Circuit Court of Appeals are final is not determined by the source or origin of the jurisdiction, but by the character of the questions involved, and it is expressly provided that the cases of the character dealt with by section 247, which include those involving the construction or application of the Constitution

of the United States, are excepted from the operation of the act—that is to say, section 134 of the Judicial Code—and since the case at bar involves the construction and application of the Constitution of the United States, it belongs to the class of cases not affected by the provisions of section 134, and the decision of the Circuit Court of Appeals is reviewable because of the provisions of section 241 of the Judicial Code. The *Macfadden case* differs from the case at bar in that the former originated in the district court of the United States, and arose under the criminal laws, and was governed by section 128 of the Judicial Code, which made all judgments of the Circuit Court of Appeals final where the source of jurisdiction was the criminal laws; while the latter case arose in Alaska and involved the construction and application of the Constitution of the United States, and is governed by section 134 of the Judicial Code, which expressly excepts from the class of cases in which the judgment of the Circuit Court of Appeals is made final, cases involving the construction and application of the Constitution of the United States.

What has been said of the case of *Macfadden vs. United States, supra,* is equally true of the other case cited by the attorney general for the Territory. In each of those cases the finality of the judgment of the Circuit Court of Appeals is determined by the source of jurisdiction and not by the character of the questions involved, so that if the source of the jurisdiction is such that cases so arising are made final by express terms of the act, they are final, notwithstanding the further fact that questions of a character which might have permitted a direct appeal to this court were also involved. If, therefore, a party having a right to go directly to this court chose to invoke the jurisdiction of the Circuit Court of Appeals, he was bound by the decision of that court, under the terms of the act, a situation that could not arise in connection with appeals from Alaska, where the decisions of the Circuit Court of Appeals are made final only in the

cases designated, which depend not upon the source of jurisdiction, but upon the character of the questions presented.

Stated in somewhat different language, but leading to the same conclusion, it may be added that section 238 of the Judicial Code provides that appeals may be taken from the district courts direct to the Supreme Court in any case that involves the construction or application of the Constitution of the United States.

Likewise, section 247 provides that appeals may be taken from the district courts of Alaska direct to the Supreme Court in all cases which involve the construction or application of the Constitution.

Counsel for the defendant in error in his brief (page 8) concedes that in this case a writ of error might have been taken from the Supreme Court direct to the district court for Alaska, because of the constitutional questions raised by the demurrer of the plaintiff in error.

Section 128 provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review decisions of the district courts in all cases other than those in which appeals may be taken direct to the Supreme Court, as provided in section 238.

Likewise, section 134 provides that, in all cases other than those in which an appeal will lie direct to the Supreme Court, appeals shall lie from the district court for Alaska to the Circuit Court of Appeals for the Ninth Circuit.

Section 128 provides that, except as provided in sections 239 and 240, the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent upon diversity of citizenship of the parties, cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases.

Likewise, section 134 provides that in all cases other than those in which an appeal will lie direct to the Supreme Court, as provided in section 247, the judgments, orders, and decrees of the Circuit Court of Appeals in Alaska cases shall be final.

It having been conceded by the attorney general for Alaska that the instant case is one in which a writ of error from the Supreme Court to the district court of Alaska might have been allowed (and this proposition cannot be questioned), it is not a case other than one in which appellate jurisdiction of the Supreme Court, on a direct appeal, is conferred by section 247; therefore, the decree of the Circuit Court of Appeals is not final.

In so far as the present case is concerned, the relevant parts of section 134 are as follows:

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in section 247, * * * writs of error and appeals shall lie from the district courts for Alaska * * * to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders, and decrees of said court shall be final *in all such cases.*"

Obviously, the last four words italicized have reference to the words "cases other than" in the first line of the section; there can be no other interpretation that will not eliminate the word "such." Those four words terminate a sentence, beginning with the words "In all cases other than." Manifestly, the purpose of the section is to assimilate the practice and appellate jurisdiction for review of Alaska cases to the practice and jurisdiction governing writs of error for review of cases in the Federal courts within the States. The beginning and termination of the sentence are tied together for that purpose.

If the decree of the Circuit Court of Appeals is not final by force of any statute, then by section 241 the right to have the decision of the Circuit Court of Appeals reviewed by the Supreme Court is absolute.

The cases heretofore cited in this brief clearly sustain this doctrine. In addition to those cases, the case of *Ohio R. R. Commission vs. Worthington*, 225 U. S., 101, 104-105, and

the cases therein cited, sustain the jurisdiction of this court to entertain the present writ of error beyond question, and require the denial of the present motion to dismiss the same. The inevitable conclusion deducible from the decisions in the cases cited is, that, as to cases of which appellate jurisdiction is given both to the Circuit Court of Appeals and to the Supreme Court, the former is an intermediate tribunal, and successive appeals, first to that court, and, second, to the Supreme Court, are authorized and lawful.

Respectfully submitted,

J. A. HELLENTHAL,
HARVEY M. FRIEND,
Counsel for Plaintiff in Error.

In the

Supreme Court of the United States

NO. 388

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error

vs.

TERRITORY OF ALASKA
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF PLAINTIFF IN ERROR

J. A. HELLENTHAL,
HARVEY M. FRIEND,
Counsel for Plaintiff in Error

SUPREME COURT OF THE UNITED STATES

ALASKA PACIFIC FISHERIES,
a Corporation,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

NO. 388.
Brief of Plaintiff in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page
Statement of Facts	3
Errors Relied Upon	9
Argument	12
The Act of the Territorial Legislature Violates the Provisions of the Federal Constitution	13
(a) The Act Confers Arbitrary Power to Deprive the Plaintiff in Error of its Property	16
(b) The Act Deprives the Plaintiff in Error of Property Without Due Process, in That it is Denied the Right to Follow its Business or Use its Property Until it has Complied with a Condition, the Performance of Which is Impossible	38
The Act of the Territorial Legislature Violates the Provisions of the Organic Act	46
The Tax Sought to be Collected is not a License Tax but a Specific Property Tax	70

CITATIONS.

	Page
Alaska Mexican Gold Mining Company v. Territory of Alaska, 236 Fed. 70	17
Bate Refrigerating Co. v. Sulzberger, 157 U. S., 1; 15 Sup. Ct. Rep., 508	45
Banger's Appeal, 109 Pa., St. 79	51-57
Brown v. Maryland, 12 Wheaton, 419	73
City of Brookfield v. Toory, 43, S. W. 387	51-73
City of St. Louis v. Spiegel, 2 S. W., 839,	58
Clark v. Brunswick, 43 N. W. Law, 175,	65
Dent v. West Virginia, 129 U. S., 114; 9 Sup. Ct. Rep., 231	27
Denn v. Reid, 10 Peters, 524	45
Ellis v. Frazier, 63 Pac., 642	51-58-73
Fire Dept. of Milwaukee v. Halvanstein, 16 Wis. 136	58
Gache County v. Jensen, 61 Pac., 303	65
Hamilton v. Rathbone, 175 U. S. 414-419; 20 Sup. Ct. Rep. 155	44
Henderson v. London & Lancashire Ins. Co., 135 Ind. 23	58
In re Quong Woo, 13 Fed., 229	28
In re Wo Lee, 26 Fed., 471,	30
In re Frazee, 63 Mich., 396,	32
In re Tax Delinquency in St. Louis County, 73 N. W., 970	57-73
In re Watson, 97 N. W. 463	57
In re Laundry Licenses, 22 Fed. 701	65
Johnson v. Macon, 62 Ga., 645	57
Levi v. City of Louisville, 30 S. W., 973	50
Livingston v. Albany, 41 Ga., 21	73
Mayor of the City of Baltimore v. Radecke, 49 Md., 217	30

	Page
Minces v. Schoenig, 75 N. W., 711	57-63
Morrill v. State, 38 Wis., 428	58
Pittsburg, Cincinnati & St. Louis Railroad Co., v. State of Ohio, 30 N. E., 435,	51-58-73
Portland Bank v. Apthorp, 12 Mass, 252-256,	58
Pittsburg etc. Railroad Co. v. Pittsburg, 60 Atl. 1077	73
Rasmussen v. United States, 197 U. S., 516	13
Reser v. Umatilla Co., 86 Pac., 595	58
Standard Oil Company v. Commonwealth, 82 S. W., 1020	51-73
State v Pennoyer, 65 N. W., 113; 18 Atl., 878	58
State v. Whitcom, 122 Wis., 110; 99 N. W., 468	58
State v. Smith, 35 Atl. 506 (Conn) 52 Am. St. Rep. 301	65
Sunset Telephone & Telegraph Co. v. City of Medford, 115 Fed., 202	65
State v. Bengsch, 70 S. W., 710	73
Sims v. Parish of Jackson, 22 La. Ann., 440,	73
Thornley v. U. S., 113 U. S. 310; 5 Sup. Ct. Rep. 491	45
Willis v. Standard Oil Co., 52 N. W., 652-4,	57
Welton v. State, 91 U. S., 275	73
Yick Wo. v. Hopkins, 118 U. S. 536; 6 Sup. Ct. Rep. 1064	23

IN THE

Supreme Court of the United States

No. 388.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error

vs.

TERRITORY OF ALASKA
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF FACTS.

This action was brought to recover moneys claimed to be due the Territory of Alaska under the provisions of an act passed by the first territorial legislature, the pertinent portions of which are as follows:

> Section 1. "That any person or persons, corporation or company, prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain license so to do from the district court or subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows, to-wit: * * *
>
> "Fisheries: Salmon canneries, seven cents per case on sock-eye and King sal-

mon; one half cent a case on hump back, cohoe or chum salmon.

Sub-Section 2. "That the licenses provided for in this act shall be issued by the clerk of the district court or any subdivision thereof in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon: Provided, that the clerk of said court in each division thereof shall give bond or bonds in such amount as the Treasurer of the Territory may require and in such form as the governor may approve,
* * *

Section 3. "That any person, corporation or company doing or attempting to do business in violation of the provisions of this act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined, for the first offense, in a sum equal to the license required for the business, trade or occupation; and for the second offense, fine equal to double amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months; Provided that each day business is done or attempted to be done in violation of this act shall constitute a separate and distinct offense; Provided further that in all proceedings under this act the costs and disbursements against any person, firm or

corporation convicted of violation thereof, in addition to the fine or penalty imposed, and for failure to pay such fine and costs such person, firm or corporation may be imprisoned, in the discretion of the court, at the rate of one day for every two dollars of said fine and costs: Provided further, however, that in the event of any person, firm or corporation shall fail to pay the license required by the provisions of this act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay said license fee or tax required by the provisions of this act, judgment may be entered against such person, firm or corporation and process shall be issued for the enforcement of the collection of said judgment, and in the same manner as judgment in civil proceedings."

The Alaska Pacific Fisheries, plaintiff in error, is a corporation operating fisheries and canning salmon in the Territory of Alaska and during the years 1913 and 1914 was so engaged, and as a result of such operations the number of cases of salmon referred to in the complaint of the kinds and varieties therein mentioned were packed and canned during said years, as mentioned in the complaint. During all of said years, and at all times, plaintiff in error has complied with the Act of Congress passed in the month of June 1906, and has paid its license taxes under said act, but did not apply for or receive a license under the provisions of the act of the territorial legislature above set

forth. Nor did it pay to the territory for a license, or otherwise, the amount specified in said act.

The foregoing facts were set up in the complaint and the court was asked to render judgment in favor of the Territory for the amount of $2,488.-98, claimed to be due by reason of the provisions of the act of the legislature. A demurrer was interposed to this complaint on the ground, among others, that the act of the territorial legislature was void, as being obnoxious to the provisions of the constitution of the United States and the provisions of the Organic Act of the territory; the particulars in which the act violated the constitution and the Organic act were in each case clearly pointed out in said demurrer and duly raised and presented to the lower court for consideration and determination.

The provisions of the Organic Act of the territory, violated by the act of the territorial legislature under discussion, insofar as they are pertinent to this case are as follows:

> Section 3. "Constitution and laws of the United States Extended.—That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or re-

pealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature; Provided, that the authority herein granted to the Legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game, fish and fur seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the act entitled, 'An Act to provide for the construction and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several acts amendatory thereof: Provided further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

Section 9. "Legislative Power, Limitations.—The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; Provided, that all authorized indebtedness shall be paid in the order of its creation, all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for

> territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of the property within the town in any one year; * * * and all laws passed, or attempted to be passed, by such legislature of said territory inconsistent with the provisions of this section shall be null and void; * * *"

The demurrer filed to the complaint was duly overruled, to which ruling and order of the court an exception was duly taken and allowed; and the plaintiff in error having elected to stand on its said demurrer, judgment was entered against it for the amount prayed for. The cause was then taken upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit where each and all of the questions presented to the lower court, as above stated, which included those now presented to this court, were again raised and presented. And the United States Circuit Court of Appeals for the Ninth Circuit having affirmed the judgment of the lower court, the case was taken on writ of error to this court.

The ultimate question presented to this court for determination deals with the validity of the act of the territorial legislature, which forms the basis of this proceeding. It is claimed by the territory that the act is in all respects a valid and subsisting act,

and it is claimed on the part of the plaintiff in error that the act is void in that it violates the provisions of the fifth and fourteenth amendments of the Federal Constitution, as well as the provisions of the Organic Act of the territory.

ERRORS RELIED UPON.

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding and deciding that Chapter 52 of the session laws of the first territorial legislature of the Territory of Alaska, which forms the basis of this action, was valid, especially insofar as it applied to the facts in this case.

The validity of this act was denied and drawn in question on the ground that the same, especially insofar as it applied to the facts of the case, was repugnant to the provisions of the Constitution of the United States and in contravention thereof, and was repugnant to the provisions of the Organic Act of the Territory of Alaska.

It was contended that the act of the legislature violated the provisions of the fifth and fourteenth amendments to the federal constitution, more especially in that it deprived the plaintiff in error of property without due process of law. The act confers upon the court or judge arbitrary power to grant or refuse the plaintiff in error and others similarly situated, a license to carry on the useful, lawful and necessary occupation and business of

fishing for and canning salmon, and thus deprives the plaintiff in error of property without due process of law. This is so, not only because the act conferred arbitrary power upon the court of judge to deny the plaintiff in error the right to follow its said business or occupation, but also because the exercise of such power in relation to such business or occupation carries with it a denial of the right to employ and make use of its fisheries in connection with the use for which the same were designed:—that is to say—the fishing for and canning of salmon, and the very enactment of the act changes theretofore absolute property rights into tenancies at will.

The United States Circuit Court of Appeals for the Ninth Circuit held that it was not an abuse of legislative power to confer this power upon the court or judge and in so deciding the Circuit Court of Appeals erred.

In this connection also, the Circuit Court of Appeals decided that since the plaintiff in error had not made an application to the court or judge for a license it could not be heard to assert the invalidity of the law. In so holding the Circuit Court of Appeals committed a further error.

It was further contended before the Circuit Court of Appeals that it was impossible for the plaintiff in error to comply with the act of the territorial legislature or to procure a license there-

under permitting it to carry on its business and occupation above referred to, for the reason that the act made it unlawful and forbade the plaintiff in error to commence or carry on its said business and occupation until it had first obtained a license and paid therefor a sum of money, the amount of which was made to depend upon the quantity and kind of fish to be caught and packed in the future. The Circuit Court of Appeals held that the act might be complied with by postponing the date of payment until after the close of the fishing season when the extent and character of the pack could be determined. In so holding and deciding the Circuit Court of Appeals erred, in view of the fact that the language of the act is plain and unambiguous, so as not to leave any room for construction and explicitly requires the payment of the amount demanded before the licensee can commence his business or occupation.

In this connection the Circuit Court of Appeals erred in not holding the act of the territorial legislature void, since it deprived the plaintiff in error of property without due process of law, in that it made the plaintiff in error's right to follow its occupation and business of fishing for and canning salmon and employing its fisheries in that connection depend upon the performance of a condition with which it was impossible to comply.

It was further contended that the act of the

territorial legislature was void in that it violated the provisions of the Organic Act, which requires that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof," it being contended that the tax sued for in this proceeding was neither uniform upon the same class of subjects nor assessed according to the value of the thing which formed the subject of taxation. Upon this point the Circuit Court of Appeals held that the tax in question was a license tax and as such could be valid under the provisions of the Organic Act, notwithstanding the fact that it was neither uniform upon the same class of subjects nor assessed according to the value of the thing taxed. The Circuit Court of Appeals erred in so holding and deciding, since the provisions of the Organic act above quoted applies to all taxes regardless of their character, including license taxes, as well as property taxes, or other taxes; and further, because of the fact that the tax in question is in truth and fact a specific tax on personal property and not a license tax at all.

ARGUMENT.

The error made by the Circuit Court of Appeals for the Ninth Circuit in holding and deciding that the act of the territorial legislature was valid, presents for discussion all of the matters to be presented to this court, but the validity of the act

can best be discussed by taking up the contentions made and considering the views of the Circuit Court of Appeals for the Ninth Circuit in connection with each contention in the order outlined in the foregoing statement of errors relied upon.

I.

THE ACT OF THE TERRITORIAL LEGISLATURE VIOLATES THE PROVISIONS OF THE FEDERAL CONSTITUTION.

It was contended in the trial court in the first instance and again when the cause was pending before the Circuit Court of Appeals for the Ninth Circuit on writ of error, that the act of the territorial legislature, which forms the basis of this action, was void in that it violated the provisions of the constitution of the United States, more especially the provisions of the fifth and fourteenth amendments.

The federal constitution was, insofar as it limited the powers of the general government, in full force in the territory before congress had taken any action in the matter. Rasmussen vs. United States, 197 U. S. 516. When the Organic act was adopted, however, it was provided that the constitution should "have the same force and effect in the territory as elsewhere in the United States," that is to say: the limitations placed by that instrument upon the powers of the states were so extended as to become limitations upon the powers of the Ter-

ritory. The third section of the Organic act provides as follows:

> "That the constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States."

and the following provision is contained in the ninth section:

> "The legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

It is contended that the power of the legislature of the territory is limited not only by the provisions of the fifth amendment but also by those of the fourteenth. Since the constitution is in force in the territory, as was held in the case of Rasmussen vs. United States, and the fifth amendment is a limitation upon the powers of congress, it would, of course, be a limitation upon the powers of the legislature, since congress could not, even if it should attempt to do so, confer powers on the legislature which it did not itself possess. But in view of the fact that it was provided in the Organic act that the constitution of the United States should have the same force and effect within the territory as elsewhere in the United States, it must follow that the fourteenth amendment which contains limitations upon the power of the state legislatures, also

limits the powers of the territorial legislature. This was the evident purpose of congress when it provided that the constitution should have the same effect in Alaska that it had elsewhere in the United States, for elsewhere in the United States the powers of the various legislatures are limited by the provisions of this amendment.

The fifth amendment provides that

> "No person shall be deprived of life, liberty or property without due process of law."

The fourteenth amendment provides that

> "No state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

It is contended that the law in question deprives the plaintiff and others similarly situated of property without due process of law and denies to it the equal protection of the laws.

The grounds for this contention are two fold.

In the first place the act confers upon the court or judge arbitrary power to deprive the plaintiff in error and others similarly situated of their right to follow the useful and necessary occupation of conducting a fishery and of using their property consisting of fisheries; and in the second place, another provision in the act denies absolutely to the plaintiff in error and others similarly situated, the right to either pursue the occupation or business of

fishing or the right to employ their property consisting of fisheries in connection with the use for which the same were designed.

(a) THE ACT CONFERS ARBITRARY POWER TO DEPRIVE THE PLAINTIFF IN ERROR OF ITS PROPERTY.

The act of the Territorial legislature provides as follows:

> "That the license provided for in this act shall be issued by the clerk of the district court, or any subdivision thereof, in compliance with the order of the court or judge thereof duly made and entered, and the clerk of the court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon."

"It was urged before the trial court and again before the Circuit Court of Appeals that the act was void in that it conferred arbitrary power upon the court or judge to grant or deny an application for a license to carry on the business of fishing, as well as the right to the use of the property employed in connection with the conduct of such business, that is to say, the fisheries.

The Circuit Court of Appeals held against this contention and held the act valid and in so doing decided that it was no abuse of the legislative power to make the court or judge the deciding authority in acting upon an application for a license and that

since no application had been made in this case, the question of whether or not the court or judge abused its power or erred in the exercise thereof, was not before the court and need not be passed upon. The decision of the Honorable Court in this regard is assigned as error.

The language employed by the Circuit Court of Appeals in deciding this point is as follows:

> "It may be that, as to licenses where the business is itself lawful, no power under the law of 1913 was given to the court to withold issuance of license after application was duly made; but, inasmuch as we think it was not an excess of legislative power to require an applicant for license to first apply to the territorial court and to make the court or judge a deciding authority in acting upon the application, a decision on the point suggested is not necessary in this case, because this plaintiff in error has never filed an application for a license, and is therefore in no position at present to assail the validity of the law on the ground of possible abuse of power vested in the court or judge called on to make an order with respect to its application. If, after it shall have applied, the court or judge should deny it a license, it will then be time enough to invoke remedy for any injustice that may have been done."

The language quoted appears in the opinion rendered in the case of Alaska Mexican Gold Mining Company vs. Territory of Alaska, 236 Fed. 70,

where the same point was raised. The last mentioned case and the case at bar were argued and submitted together and presented identical questions. Some of these were discussed by the Circuit Court of Appeals in the opinion in each case but not repeated in both cases.

The act explicitly provides that a license shall issue, if it issues at all, in compliance with the order of the court or judge duly made and entered and that the clerk shall keep a record of the applications, the recommendations and remonstrances, and the action of the court thereon.

Under this act, therefore, all applications, together with remonstrances and recommendations must be presented to the court or judge who is required to act thereon and to make and enter an order.

That this order of the court may be such as to either grant or refuse the license is evident from the provisions of the act. From the mere provision that the license could only issue in compliance with the order of the court or judge upon an application duly made and entered, it would follow that the court or judge was endowed with the authority to either grant or refuse the license. But the act goes further—it provides for the filing of recommendations for and remonstrances against the granting of a license. These recommendations could serve no purpose unless designed to induce the court to grant the license nor could the remonstrances

serve any purpose unless it was intended that they should operate as an inducement for the court to deny the license. The act further provides that the clerk must keep a record of the action of the court on these recommendations and remonstrances, indicating still further that the court or judge is to take action on the matters so presented to him, that is to say, is to pass upon their sufficiency or insufficiency; in other words, he is to allow or disallow the application for a license.

It is made the duty of the court to either grant or withhold permission to carry on or conduct any of the lines of business mentioned in the act, for a license is nothing more than a permit to do that which without it would be unlawful. None of the lines of business referred to in the act is such as to be within itself unlawful. They are merely unlawful, because of the terms of the act and then only if carried on without a license being first obtained.

The act contains no regulatory provisions nor does it prescribe any conditions with which an applicant can comply so as to entitle him a license as a matter of right, but the whole question of whether a license shall or shall not be granted in a given case is left to the arbitrary will of the court or judge to whom the application is made. The court or judge either grants or refuses the license, as the case may be, with nothing before him except

the application and such recommendations for and remonstrances against the granting of the license as may be filed; and these later may be based upon any ground that caprice, malice, self interest or any other consideration whatsoever may dictate. No hearing before the court or judge is provided for; nor could a hearing serve any useful purpose, for the action of the court or judge does not depend upon this or that proven fact but upon his whim or caprice.

In the case of those occupations which are considered harmful in themselves, unless controlled and regulated under the police power, it is often essential that the persons pursuing them should be possessed of good moral character or that prescribed conditions should be complied with; and the question of whether an applicant has a good moral character or has complied with the conditions prescribed must, of course, be passed upon by the court, judge or other board or tribunal issuing the license. Even then, the tribunal upon which power is so conferred can pass merely upon the existence or non-existence of the prescribed conditions and must be guided by the provisions of the law, a license cannot be granted to one and refused to another unless some legal reason exists why this should be done. Government must be and remain, government by law as distinguished from government by men.

Here, however, there is no pretext at regulation

under the police power or otherwise. No regulatory provisions are contained in the act, nor is it pretended that the occupations dealt with are harmful in themselves. Among the occupations that cannot under this act be carried on without the permission of the court or judge granted in the form of a license, are fishing and mining occupations that are not only commendable and so useful that their pursuit redounds to the benefit of all, but in Alaska they lie at the foundation of all industrial prosperity, since they are followed here to the practical exclusion of all others.

Many millions have been invested in connection with the mines and fisheries in Alaska, yet not a single mine or a single fishery can be operated without the permission or consent of the court or judge. Nothing that those who have made these enormous investments can do will place them in a position where they can demand a license to operate a mine or fishery as a matter of right. They may make applications, their friends may recommend and their enemies may remonstrate; if the licenses are granted they are merely the recipients of favors; if they are denied the applicants have not even the right of appeal.

One engaged in mining or fishing, therefore, not only holds his business which is his means of making a livelihood and is property in the highest sense of the term, but also the mine or the fishery

which constitutes the property owned and used in connection therewith, as a tenant at will at the hands of the court or judge. When a court or judge denies to an applicant the right to carry on the business of fishing, such denial also deprives him of the right to use the fishery, since a fishery can be used only in connection with the conduct of the business of fishing. When one is denied the right to use his property he is deprived of property as effectually as he would be if the property were actually taken away from him, for, as Lord Coke says: "What is property without the use thereof?" Clearly the right of property carries with it the right to its free use and enjoyment.

From what has been said it must follow that the act under discussion is void, not only because under it the court or judge has the arbitrary power, to deny those engaged in fishing the right to follow that business or occupation and the right to the use of such property as is designed to be employed in connection therewith, but also because by its very enactment, the legislature took from those engaged in the business of fishing, property which theretofore belonged to them. Before the enactment of the statue they had the right to freely follow their occupations and enjoy their property to its fullest extent; after its enactment they have the right to pursue the former or use the latter only if the court or judge permits them so to do. The

very enactment of the statute reduces freemen to serfs and titles in fee to tenancies at will. As was said by Justice Mathews in Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064:

> "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essense of slavery itself."

In the last mentioned case the precise question now under discussion was before this court. The board of supervisors of the city and county of San Francisco passed an ordinance making it unlawful for any person to establish, maintain or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except in cases where such laundry was located in a building constructed either of brick or stone. The plaintiff in error had been convicted of violating this ordinance and applied for a writ of habeas corpus, relying on the invalidity of the ordinance. The supreme court of California held the ordinance valid as a proper exercise of the police power, basing their decision upon cases decided by this court, in which it was held that certain ordinances regulating the laundry business were valid as a proper exercise of the police power. This court,

however, reversed the decision of the supreme court of California on the ground that the ordinance before the court was not a regulatory measure, the enactment of which could be justified under the police power, but one which conferred on the supervisors arbitrary power to grant or deny to an applicant the right to follow the useful occupation of conducting a laundry. Speaking through Mr. Justice Matthews the court say:

> We are consequently constrained, at the outset, to differ from the supreme court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinance which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons; so that, if an applicant for such a consent, being in every way a competent and qualified person, and having complied with every

reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

After using the language quoted, the court distinguished between the cases relied upon as authority by the supreme court of California and the cases under discussion, and continuing say:

"The ordinance in question in the present case is of a very different character. It does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, without restriction, the use for such purposes of buildings of brick and stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaption of the buildings themselves, but merely by an arbitrary line, on one side of which

> are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom the consent is withheld, at their mere will and pleasure. And both cases are alike only in this: that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

and again on the following page:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

The point decided in the foregoing case is in all respects identical with the point now under discussion. There a laundry could not be conducted in a wooden building unless permission so to do was first obtained from the board of supervisors. Here a fishery cannot be conducted at all unless

permission is first obtained from the court or judge. In that case the ordinance was held void. It must follow that the statute is equally void under the facts in the case now before the court.

So, also in the case of Dent vs. West Virginia 129 U. S. 114; 9 Sup. Crt. Rep. 231.

In that case the question before the court was whether or not the state of West Virginia had the power to prohibit persons not possessed of the requisite skill to follow the practice of medicine and the court held that the power of the state to prescribe for the general welfare of the people authorized it to prescribe regulations of that character, in order to secure the people against the consequences of ignorance and incapacity, as well as of deception and fraud; but while the legislation of the state of West Virginia was upheld, the court very clearly expressed the meaning of the phrase "due process of law" as employed in the constitution. It was said:

> "As we have said on more than one occasion it may be difficult, if not impossible, to give to the term, 'due process of law' a definition which will embrace every permissible exertion of power effecting private rights, and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived; and their requirement was there designed to secure the subject against the arbitrary

action of the crown, and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.' In this country the requirement is intended to have a similar effect against legislative power; that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient for the purpose of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen. As said by this court in Yick Wo vs. Hopkins, speaking by Mr. Justice Matthews: 'When we consider the nature of the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' "

In the case of In Re Quong Woo, 13 Fed. 229, an ordinance of the city of San Francisco enacted

prior to the time that the ordinance before the court in the Yick Woo case had been enacted and in all respects similar to that ordinance, except that it was provided that the laundry business could not be carried on without having first obtained the consent of the board of supervisors, which it was provided should be granted only upon recommendation of twelve citizens and tax payers in the block in which the laundry was proposed to be established was before the court.

Mr. Justice Field held the ordinance invalid and in the course of the opinion stated the law to be as follows:

> "Licenses for callings, trades, and employments may be required by the supervisors where the nature of the business demands special knowledge or qualifications on the part of the party, as in the case of dealers in drugs. They may also be required as means of raising revenue for municipal purposes. But in neither case can they be required as a means of prohibiting any of the avocations of life which are not injurious to public morals nor offensive to the senses nor dangerous to the health and safety. Nor can conditions be annexed to their issue which would tend to such a prohibition. The exaction for any such purpose of a license to pursue a vocation of this nature, or making its issue dependent upon conditions having such a tendency, would be an abuse of authority. Such is evidently the tendency and purpose of the conditions required in

> the ordinance in question in this case, and we have no doubt if its invalidity for that cause."

In the case of In Re Wo Lee, 26 Fed. 471, which was considered by this court at the same time that the Yick Wo case was considered, and arose upon precisely the same state of facts, the ordinance of the city of San Francisco dealt with the Yick Wo case was before the circuit court. Judge Sawyer observed that the ordinance was in principle not different from the ordinance before the circuit court in the case of Quong Woo, and after quoting with approval the language of Mr. Justice Fields above quoted, added, among other things:

> If it is competent for the board of supervisors to pass a valid ordinance prohibiting the inhabitants of San Francisco from following any ordinary proper and necessary calling within the limits of the city and county, except at its arbitrary and unregulated discretion and special consent and—can do so—if this ordinance is valid, then it seems to us that there has been a wide departure from the principles that have heretofore been supposed to guard and protect the rights, property and liberties of the American people."

Again in the case of the Mayor of the City of Baltimore vs. Radecke, 49 Md. 217, the Supreme Court of Maryland had occasion to pass upon the validity of an ordinance passed by the City of

Baltimore, under which the mayor was empowered to notify any one employing steam engines within the limits of the city to remove the same on six months' notice under a prescribed penalty. The Supreme court of Maryland held the ordinance void and in doing so employed the following language:

> "It does not profess to prescribe regulations for their construction, location or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other any attempt to promote their safety and security without destroying their usefullness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so and by providing compulsory fines for every day's disobedience of such notice and order of removal, render his power over the use of steam in the city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partially and oppression prevented. It is clear that giving and enforc-

> ing these notices may, and quite likely will, bring ruin to the buisness of those against whom they are directed, while others from whom they are withheld may be actually benefitted by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance, which, clothes a single individual with such power, hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

The view of the Supreme Court of Maryland was approved by this court in the case of Yick Wo and the language above quoted was quoted at length in the opinion.

And in the case of In Re Frazee, 63 Mich. 396, the Supreme Court of Michigan had before it an ordinance of the city of Grand Rapids, which provided that parades through the public streets were to be unlawful, unless a permit had first been obtained from the mayor or common council of the city. The court held the ordinance void and held that the legislature of the state had no power to

authorize its enactment. Upon this point, Chief Justice Campbell, speaking for the court, says:

> "If the legislatures of the state had the power to subject the people of cities to the uncontrolled and arbitrary will of a common council, and, having such power, had clearly signified their purpose to do so, then it might perhaps be claimed, with some show of reason, that the city of Grand Rapids could do what it pleased under these grants of power. But the rules of legal construction allow no such absurdity. It is not in the power of the legislature to deprive any of the people of the enjoyment of equal protection under the law, or to give cities any tyrannical powers."

And again in the course of the opinion it is said:

> "When men in authority have arbitrary power, there can be no liberty."

The foregoing authorities make it clear that the territorial legislature had no power to confer upon the court or judge authority to arbitrarily grant or withhold a license to carry on a useful business or occupation such as that of fishing, or deny to the owner of a fishery the right to employ such fishery in connection with the use for which it was designed, and the action of the Circuit Court of Appeals in holding that it was no abuse of legislative power to require an applicant for a license to apply first to the territorial court and to make the court or judge a deciding authority in acting upon the application was clearly erroneous; nor can

the fact that the applicant had made no application under the law for a license in any manner affect the issues now before the court.

Of course, if the Circuit Court of Appeals were correct in the position taken by them that the legislature could endow a court or judge with arbitrary powers in regard to the matters referred to and could require those engaged in fishing, mining, etc., to submit to the exercise of this arbitrary power by making an application for permission to pursue their respective occupations, the position taken by the Circuit Court of Appeals and the conclusions reached could not be objected to. The plaintiff in error having made no application, the court could take no action that could be the subject of review. No attempt is here made to review an order granting or refusing a license, that could not be done in any event, for the territorial act does not provide for an appeal from such orders.

The provisions of the federal constitution designed to do away with arbitrary power in every form, are not such as to require a citizen to submit to the exercise of arbitrary power, should it be lodged in any court or tribunal by the legislature. Since arbitrary power can vest nowhere under the benign provisions of our free constitution, a legislative act conferring such power is merely void and it is not only the privilege but the duty of the citizen to ignore it.

Indeed, if an application had been made under the act of the territorial legislature to the court or judge for a license, there would be much ground for say-

ing that the applicant had waived the unconstitutionality of the law. It is fundamental that one cannot seek or ask for an advantage under a law and at the same time assert its unconstitutionality. On the other hand, it is equally fundamental that any one affected by the enforcement of an unconstitutional law may raise the question of its unconstitutionality whenever such law is sought to be enforced against him, unless he has in some manner waived his right to do so. Here, the action is based upon the provisions of the act complained of. It is not contended that the action could be maintained if it were not for the act and the defendant, without having waived any rights in this regard, asserts its unconstitutionality.

It is not clear what was meant by the Circuit Court of Appeals when it was said, "it may be that as to licenses where the business is in itself lawful, no power under the law of 1913 was given to the court to withhold issuance of licenses after application was duly made." The act does not deal with lines of business or occupations that are within themselves unlawful. Each business or occupation named in the act is in itself lawful, yet the act clearly authorizes the court or judge to either grant or deny an application for a license to carry on any of the lines of business referred to and other portions of the opinion of the Circuit Court of Appeals clearly indicate that the court so construed the act.

The Circuit Court of Appeals comment upon the similarity between this act and the act of congress in force in Alaska, requiring a license to carry on the business of selling intoxicating liquors. It is true that these two acts are similarly worded but they are very different in their character. This act deals with licenses for occupations that are within themselves lawful and prescribes no rules or regulations whatsoever; that act is a regulatory measure, regulating under the police power the business of selling intoxicating liquors. Under this act the court is given arbitrary power to capriciously grant or refuse a license to one following a useful occupation; under that act the court is given the power to determine whether the person making the application is a fit person to carry on a business of the character mentioned, and further to determine whether he has complied with the conditions and regulatory measures prescribed. The distinction between the two cases is clearly pointed out by this court in the case of Yick Wo vs. Hopkins above referred to.

Nor is the act in question void in part so that the invalid portion might be disregarded and the action maintained.

Section 1 of the act provides that any person, etc., prosecuting or attempting to prosecute any of the lines of business named,

> "shall first apply for and obtain a license so to do from the district court or a subdi-

vision thereof in said territory and pay for said license for the respective lines of business and trades as follows."

It will be observed that the person desiring to carry on any of the lines of business referred to, must first apply for and obtain a license so to do and that the money to become due the territory becomes due in payment for the license and not otherwise.

The first step to be taken under the act is the making of an application for a license to the court or judge. This cannot be done without submission to the arbitrary power vested in the court or judge under the provisions of the act. No one can be called upon to submit to such arbitrary power, yet without such submission, it is impossible to obtain a license and unless a license has been obtained no money becomes due under the act. Anyone carrying on one of the forbidden occupations without a license commits a crime and upon conviction he may be fined and in some cases imprisoned under the terms of the act, but not having a license he does not owe for a license, and no provision is made for the payment of money except in payment of a license first obtained. Hence, since the provision under which the license must be applied for and obtained is clearly void, the entire act becomes inoperative and invalid.

Nor was it possible for the defendant to have

made application to the court or judge for a license, as suggested by the Circuit Court of Appeals that it should have done. It is provided by the act that these applications must be made and licenses obtained and the money required in payment for the license paid, before the applicant can lawfully commence business, and in the case of those carrying on the business of operating a fishery, the amount to be paid for the license is made to depend upon the number and kind of fish caught and canned. That no one can determine in advance the number and kind of fish that will be caught and packed during a given season goes without saying. Yet, under the act in question, no licenses can be either applied for and obtained unless this is done.

This brings us to a discussion of the second ground, upon which it is claimed that the act of the territorial legislature violates the federal constitution and deprives the plaintiff in error of property without due process, in that it is denied the right to carry on its business and occupation of fishing and the right to use its property consisting of fisheries until it has first complied with a condition, the performance of which is impossible.

(b) THE ACT DEPRIVES THE PLAINTIFF IN ERROR OF PROPERTY WITHOUT DUE PROCESS, IN THAT IT IS DENIED THE RIGHT TO FOLLOW ITS BUSINESS OR USE

ITS PROPERTY UNTIL IT HAS COMPLIED WITH A CONDITION, THE PERFORMANCE OF WHICH IS IMPOSSIBLE.

Section 1 of the act of the territorial legislature, which forms the basis of this action, provides as follows:

> "That any person or persons, corporation, or company prosecuting or attempting to prosecute any of the following lines of business within the territory of Alaska, shall first apply for and obtain a license so to do from the district court or subdivision thereof in said territory, and pay for said license for the respective lines of business and trades, as follows to-wit:
>
> Fisheries: Salmon canneries, seven cents per case on sock-eye and king salmon; one-half cent a case on hump back, cohoe or chum salmon."

Section 3 provides as follows:

> "That any person, corporation or company doing or attempting to do business in violation of the provisions of this act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for the first offense, in a sum equal to the license required for the business, trade or occupation; and for the second offense, fine equal to double amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months; provided, that

each day business is done or attempted to be done in violation of this act shall constitute a separate and distinct offense."

This act, it will be observed, provides that any one engaged in the business of canning salmon without first having obtained and paid for a license so to do seven cents per case on all sockeye and king salmon and one-half cent a case on all hump back, cohoe or chum salmon shall be deemed guilty of a misdemeanor.

Section 3 of the act is very explicit in its provisions, insofar as it relates to the time and manner of making the payment for the license. It is there provided that any one doing or attempting to do business in violation of the provisions of the act, or "WITHOUT FIRST HAVING PAID THE LICENSE THEREIN REQUIRED," shall be deemed guilty of a misdemeanor.

Since it is illegal to commence operating a fishery before a license has been obtained and paid for, the fish on which the person operating the fishery is required to pay the given amount per case, cannot be the fish that he has caught and packed, but the fish that he is going to catch and pack.

The applicant must predict in advance the number of cases of each of the varieties of salmon mentioned that he is going to catch and pack, during the season for which the license is to run,

and pay the territory for a license seven cents per case on all sock-eye and king salmon that he is going to catch and pack, and one-half cent a case on all hump back, cohoe or chum salmon that he is going to catch and pack during this period. That this cannot be done is obvious.

In this connection it is contended that the territorial act under discussion, if regarded as valid and enforced, deprives the plaintiff in error and all others similarly situated, of their right to follow the business and occupation of fishing for and canning salmon and of using and employing their property consisting of fisheries, in connection with the use for which the same were designed.

Since this act makes the existence of these rights depend upon a condition with which it is impossible to comply, the rights are as effectively taken away and destroyed as they would have been if it had been provided that after the passage of the act it should be unlawful to carry on the business of operating a fishery or salmon cannery or to make use of a fishery in connection with the business of fishing.

Clearly to provide that one can follow the business of operating a fishery or can employ his fishery in connection with the use for which it was designed only after he has done something which it is impossible for him to do, is equiva-

lent to saying that he cannot carry on the occupation named or use the property mentioned, at all. That a legislative act having this effect deprives those affected of property without due process is evident.

The Circuit Court of Appeals, however, held that the act might be complied with by postponing the date of payment until after the year's business had been completed. The difficutly with this decision lies in the fact that there is nothing in the act that would permit such postponement. The terms of the act are clear and explicit. No terms are employed that are of doubtful meaning. The act first provides that any person, etc., prosecuting or attempting to prosecute any of the lines of business mentioned,

> "shall first apply for and obtain a license so to do."

Section 2 provides that

> the license shall be issued by the clerk and that the clerk shall give a bond in such amount as the treasurer of the territory may require.

Section 3 provides that

> any person, corporation or company doing or attempting to do business in violation of the provisions of this act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor.

No authority is vested in the clerk to issue the license without the payment of the license tax, nor is the court or judge authorized to order the issuance of a license without such payment. Not only does the act contain no provisions authorizing such procedure, but section 3 expressly provides to the contrary. It, in express language, makes it unlawful to do business "without first having paid the license therein required."

The clerk is required to give a bond and he would undoubtedly be held liable on his bond if he issued a license without receiving the money in accordance with the express provisions of the act.

A license, therefore, cannot be obtained under the terms of the act until an amount depending upon the number and kind of fish to be caught in the future has been paid. Since such payment cannot be made, because no one can tell in advance anything about the number or kind of fish that he will be able to catch, and since the act makes it unlawful to commence business without a license, business cannot be commenced at all.

The act not only provides that a license must first be obtained but also that the license must first be paid for, and unless both of these conditions are complied with, under the express and explicit terms of the act, the person so failing to comply therewith becomes guilty of a misdemeanor and subject to the numerous penalties imposed.

The difficulty with the act is not that it was carelessly drawn or that its language admits of more than one construction. The terms employed are not of doubtful meaning but clear and explicit, yet it is to these, and to these only, that we must look in order to ascertain the intent of the legislature.

Before the act could be complied with in the manner indicated by the Circuit Court of Appeals, two things would be necessary: First, that which is expressly written in the act would have to be erased therefrom; and second, that which is not event hinted at would have to be substituted in the place thereof. That no one could comply with the act as written must be conceded, yet no one, except the legislature itself would have the authority to rewrite the act in order to so word it that it could be complied with.

If the language of the act had been such as to admit of more than one construction, the Circuit Court of Appeals would have been right in adopting that construction which was the more reasonable and sensible, but since the act was explicit and unambiguous in its terms there was no room for construction.

The rule in such cases is clearly laid down by this court in the case of Hamilton v. Rathbone, 175 U. S. 414-419, 20 Sup. Ct. Rep. page 155, where it is said:

> The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it."

And after reviewing the authorities and former decisions of this court upon the same subject it is said:

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary."

The following cases are to the same effect:

Denn. v. Reid, 10 *Peters*, 524.

Thornley v. U. S. 113 *U. S.* 310;

5 *Sup. Ct. Rep.* 491;

Bate Refrigerating Co. v. Sulzberger, 157 *U. S.* 1; 15 *Sup. Ct. Rep.* 508.

II.

THE ACT OF THE TERRITORIAL LEGISLATURE VIOLATES THE PROVISIONS OF THE ORGANIC ACT.

The act on its face is a revenue act designed to raise revenue, requiring the payment of a fixed sum in each of the enumerated cases for a license. It is entitled, "An Act to establish a system of taxation, create revenue and provide for the collection thereof for the Territory of Alaska and for other purposes."

Section 1 provided:

> "That any person, or persons, corporation or company, prosecuting or attempting to prosecute any of the following lines of business within the territory of Alaska shall first apply for and obtain license so to do from the district court or subdivision thereof, in said territory, and pay for said license for the respective lines of business and trade, as follows, to-wit: * * *
>
> "Fisheries: Salmon canneries, seven cents per case on sock-eye and king salmon; one-half cent a case on hump-back, cohoe, or chum salmon."

That the sole object of the act is the collection of revenue is not disputed. This much is conceded by counsel for the territory, and the Circuit Court of Appeals held it to be such. If then the moneys sought to be raised under the provisions

of the act are taxes, it remains to be seen how and in what manner taxes may be collected in the territory and what limitations upon the taxing power are imposed by the Organic Act.

Whatever power is possessed by the territorial legislature of Alaska is derived from the Organic Act. Congress has under the constitution plenary power to legislate for the territories. It may either exercise this power or it may delegate it in whole or in part to a territorial legislature. In the case of Alaska, it has in part only delegated its powers in this regard to the legislature of the territory by the Organic act.

The Organic act of a territory is a grant of legislative powers. Such grants are always strictly construed. No power passes except such powers as are either expressly conferred or are conferred by necessary implication. The powers expressly conferred are those that are stated in express terms. The powers conferred by necessary implication are limited to such as may be necessary to carry into effect the powers expressly granted.

Every sovereign power has the inherent right to collect revenues since this right is necessary to its existence. The territory of Alaska, however, is not a sovereign power so as to be endowed with this inherent right. It is a mere territory of the United States and its legislature is the creature of the Congress; like other legislative bodies, simi-

larly created, it is endowed with such powers only as are conferred upon it.

Section 9 of the Organic act contains the following provision:

> "The legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States."

The same section also contains the following provision:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof. No tax shall be levied for territorial purposes in excess of one per centum on the assessed valuation of property therein in any one year, nor shall any incorporated town or municipality levy any tax for any purpose in excess of two per centum of the assessed valuation of the property within the town in any one year * * * and all laws passed or attempted to be passed, by such legislature in said territory inconsistent with the provisions of this section shall be null and void."

Under the provisions extending the legislative power to all rightful subjects of legislation the power to raise revenue by means of taxation is, in a general way, subject to the limitations elsewhere in the same section contained, conferred. But since legislative grants are strictly construed,

the powers thus conferred in a general way must be exercised in strict conformity with the requirements of the Organic Act itself and in strict subordination of the limitations imposed.

Section 9, containing this general grant of powers, also contains the limitations placed by Congress upon the taxing power with a view of protecting the people of Alaska against unequal, unjust and excessive taxation, and contains an express mandate that all laws passed, or attempted to be passed, which do not conform to the provisions of that section shall be void.

In order to determine, therefore, whether the tax in question is valid, it is only necessary to inquire whether it conforms to the provisions of section 9. If it fails to comply with the requirements of this particular section, congress has expressly provided that it shall be void.

Whether this tax be viewed as a specific tax on property, that is to say, a tax on the salmon of so much per case, or as a license tax on the occupation of operating a salmon cannery, the tax clearly violates all of the provisions of section 9, above referred to.

If considered as a specific tax on property, it is levied on such cases of salmon only as are in the hands of the canneries or fisheries. It is a tax on the salmon of so much per case, but all salmon is not taxed. A merchant, a broker, a fish

dealer or any other person, except someone operating a fishery, may own and have in his possession any quantity of cases of salmon, yet under this act he is not required to pay any tax whatsoever thereon, none except those engaged in the operation of fisheries or canneries being required under the terms of the act to pay any tax. Hence, it lacks uniformity.

The tax, also, viewed as a property tax, clearly violates the provision that taxes must be assessed according to the actual value of one thing taxed. The act provides for a tax of seven cents per case on sock-eye and king salmon; one-half cent a case on hump-back, cohoe or chum salmon. No provision is made in the act for any assessment whatsoever, whereas the Organic act clearly requires first, that an actual assessment be made, and second, that the assessment so made shall be according to value.

The question as to whether an actual assessment is necessary in such cases was before the Supreme Court of Kentucky in the case of Levi v. City of Louisville, 30, S. W. 973.

Nor is it enough that an assessment be made. The Organic act provides that these assessments must be according to actual value. The act of the territorial legislature taxes canned salmon at the rate of so much per case, regardless of its value. Sock-eye and king salmon are taxed seven cents per case, without any regard to how much these

salmon will bring in the market, and without any regard to what they are worth. The other kinds of salmon enumerated are taxed one-half cent a case without any regard to value.

Viewed as a license tax, the tax in question also violates these provisions of section 9, in that, it is not uniform upon the same class of subjects, in that it is not assessed according to the value of the thing taxed, and there is, of course, no way of telling whether the tax exceeds the amount of one-per cent of the assessed valuation, since no assessment was made. While all those engaged in operating salmon canneries are required to obtain and pay for a license, there is no uniformity in the amount that the licensees are required to pay. In fact, the amount required is different in each case, depending upon the number of cases of the various varieties of fish packed. While the legislature has the power to classify the things which are the subject of taxation, it has not the power to place each individual taxpayer in a class by himself. This it not classification.

Banger's Appeal, 109 *Pa. St.* 79;
Standard Oil Company v. Commonwealth 82, *S. W.* 1020.
Pittsburg, Cincinnati & St. Louis Railroad Co. v. State Ohio, 30 *N. E.* 435;
City of Brookfield v. Toory, 43, *S. W.* 387;
Ellis v. Frazier, 63 *Pac.* 642.

Nor is the tax assessed according to the value of the thing taxed. Viewed as a license tax the business of operating a fishery or salmon cannery is the subject of taxation and of course no attempt it made to assess this business or occupation for taxation. The amount of the tax in no sense depends upon the value of the business or occupation.

How then can the tax be sustained in the face of the express mandate contained in section 9 of the Organic act, where all the limitations upon the taxing power above cited are also found to the effect that all legislation, or attempts at legislation, which do not conform with the provisions of that section shall be void?

The Circuit Court of Appeals expressed the opinion that the tax sought to be collected was a license tax, and that because of the fact that it was a license tax it was not necessary that it should comply with the limitations upon the taxing power above referred to. This notwithstanding the fact that by the express terms of the provisions of the Organic act referred to, "all taxes", without exception, are made subject to the requirements therein mentioned.

It is said in the opinion that well considered cases may be found in support of this position. It is quite true that there are several decisions to the effect that under the peculiar provisions of the state constitutions of these states wherein such deci-

sions were rendered, license taxes are not required to be uniform or assessed according to value, but the constitutional provisions under which all the decisions that so hold were rendered, will, upon examination, be found to be wholly unlike the provisions contained in the Organic law of Alaska. Of course, the effect of a provision contained in the Organic law of any state or territory must depend in each case upon the language employed, and the desicions of the courts relating thereto must be read in the light of the language of the provision construed.

The cases referred to may be grouped in three classes. Those of the first class are rendered under constitutional provisions so worded as to expressly except license taxes from the operation of the requirements of uniformity and assessment according to value. Decisions rendered under constitutional provisions of this character can, of course, have no application to the facts in this case, for the Alaska Organic law contains no such provisions. The Organic act of Alaska provides that all taxes must be uniform and assessed according to value and contains no provision to the effect that license taxes may be assessed without regard to these requirements.

The decisions under the second class are those rendered under constitutional provisions expressly limiting the application of the requirements of uniformity and assessment according to value, to

property taxes. In those states where a constitutional provision is found to the effect that "property taxes" shall be uniform or that "property taxes" shall be assessed according to value, it has been held that license taxes need not be uniform or assessed according to value, as the case may be, for the reason that the constitutional requirements referred to are expressly limited in their application to "property taxes," whereas license taxes are not considered as property taxes or taxes on property but as taxes on occupation, and since such taxes are not taxes on property, constitutional requirements that relate only to "property taxes" are held to have no application to license taxes. This class of cases can also have no application to this case for, as already stated, the Organic act of Alaska does not provide that "property taxes" shall be uniform or that "property taxes" shall be assessed according to value, but that "all taxes" shall be uniform and assessed according to value without regard to their character.

The decisions of the third class are those which do not refer to license taxes at all but to license fees exacted under the police power for the purpose of regulation, as distinguished from license taxes exacted under the taxing power for the purpose of revenue. These cases, of course, rest upon an entirely different principle.

When in the interest of the public health, the

public morals or the public safety, it becames necessary to supervise or regulate an occupation or business, the legislature may require a license from those engaged therein for the purpose of regulating the same, and may in that connection adopt such regulatory provisions as may be necessary; it may also require the payment of a license fee sufficiently large to pay the costs of issuing the license and in addition thereto the costs of supervision and regulation. The fees required to be paid, however, cannot exceed the amount necessary for the purposes mentioned, and must be exacted in good faith to meet the expense of regulation and not for the purpose of raising revenue. In so acting the legislature proceeds under the police power of the state. In the exercise of the police power the legislature is, of course, not restricted by the limitations placed upon the taxing power and it is for that reason that the validity of laws exacting license fees under the police power is not affected by the provisions in the Organic law relating to taxes. Such license fees are not taxes and depend for their validity not upon a compliance with the constitutional requirements relating to taxes, but upon the question of whether the regulation in connection with which they are exacted is reasonably necessary to promote the public health, public morals or public safety.

Not so in the case of license taxes. These have nothing to do with the public health, public

morals or public safety. In imposing license taxes, the object and aim of the legislature is the collection of revenue. In character, a license tax does not differ from any other tax. It is levied against the occupation or business of the person called upon to pay it just as a property tax is levied against the property of the person called upon to pay such tax, the object in each case being the production of rev enue, for the support of the government. The only difference between a license tax and a property tax lies in the procedure provided for enforcing the collection of the tax.

On the other hand, there is no similarity between license fees exacted under the police power and license taxes exacted under the taxing power, although the method of procedure for their enforcement may in some respects be similar. As was said by Judge Cooley in his work on taxation, page 396:

> "The distinction between a demand of money, under the police power, and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases though the purpose is essentially different. The one is made for regulation and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power."

It will be seen, therefore, that the decisions that relate to license fees exacted under the police power have no application to the facts in this case.

None of the state constitutions contains a provision, as does the Alaska Organic act, that all taxes must be assessed according to value. In this respect the Organic law of Alaska differs from the constitutions of all the states, but several of the state constitutions contain provisions to the effect that all taxes must be uniform. While the language employed in most, if not all, of the constitutions containing this provision differs from that employed in the Organic act of Alaska, its effect is the same, and wherever this language is employed and no further provision is found expressly exempting license taxes from its operation or expressly limiting its operation to property taxes, it has been uniformly held that license taxes come within the constitutional provision, that they are taxes in the same sense as property taxes are taxes and must therefore, in order to be valid, comply with the constitutional requirements of uniformity.

Banger's Appeal, 109 *Pa. St.* 79;
Willis v. Standard Oil Co. 52 *N. W.* 652-4;
In re Tax Delinquency in St. Louis County, 73 *N. W.* 970;
Minces v. Schoenig, 75 *N. W.* 711;
In re Watson, 97 *N. W.* 463;
Johnson v. Macon, 62 *Ga.* 645;

Henderson v. London & Lancashire Ins. Co. 135 *Ind.* 23;
Portland Bank v. Apthorp, 12 *Mass,* 252-256;
State v. Pennoyer, 65 *N. W.* 113; 18 *Atl.* 878;
City of St. Louis v. Spiegel, 2 *S. W.* 839;
Pittsburg C. & St. L. R. R. Co. v. State 30 *N. E.* 435;
Ellis v. Frazier, 63 *Pac.* 642;
Reser v. Umatilla Co. 86 *Pac.* 595;
Fire Dept. of Milwaukee v. Halvanstein, 16 *Wis.* 136;
Morrill v. State, 38 *Wis.* 428;
State v. Whitcom, 122 *Wis.* 110; 99 *N. W.* 468;

A review of the decisions of the state courts under constitutions containing limitations upon the taxing power, clearly points out one thing above all others, and that is, that in all cases the provisions containing these limitations are construed just as they are written. Wherever a constitutional requirement exists to the effect that taxes must be uniform, and this requirement is not expressly limited in its application to property taxes and is unaccompanied by an express provision under which license taxes are exempted from its operation, the courts have held that the requirement applies to all taxes alike, including license taxes as well as

taxes upon property. The Organic law of Alaska provides that "all taxes" shall be uniform upon the same class of subjects. The provision applies to all taxes. No distinction is made between license taxes and property taxes. It refers to "all taxes" that is to say, each and every kind of a tax, and since a license tax is a tax, it must, in order to be valid, conform to the requirement of uniformity, and this is in exact accord with the decisions of the state courts rendered under similar constitutional provisions.

But the Organic act of Alaska does not stop here. It requires more than uniformity. The language is:

> "All taxes shall be uniform upon the same class of subjects * * * and the assessments shall be according to the actual value thereof."

Under this provision, then, all taxes must be based upon an assessment, and this assessment must be according to the actual value of the thing which is the subject of taxation. No state constitution contains a provision to the effect that all taxes must be assessed according to the value of the thing taxed. This provision is peculiar to the Alaska Organic law. Many state constitutions provide that all "property taxes" shall be levied according to actual value but none that all taxes shall be so levied.

But since the phrase "all taxes" is, when it occurs in the uniformity clauses of the state constitutions, held to include license taxes as well as property taxes, the same phrase, if applied to those clauses requiring assessments according to value, would of course be construed in the same manner if any of the state courts were called upon to construe it in that connection. The phrase "all taxes" cannot be construed except to embrace all money exactions made with a view of supplying revenue for the support of the government. Such money exaction is a tax, and it is immaterial whether it is made in the form of a license tax or a property tax. The phrase "all taxes" is at once the most comprehensive and the most all-inclusive of any that congress could have employed. If this language does not include license taxes, it is difficult to conceive of any language that would have been broad enough to include them.

The idea that the term "all taxes" does not include license taxes finds its origin in a wrong conception of what a license tax really is. It results from a confusion of license fees exacted under the police power with license taxes. There is nothing occult or mysterious about a license tax. It is not different from any other kind of a tax; it is simply a specific tax upon occupation, just as the specific tax on property is a tax on property. Money exactions under the police power may be allusive and pe-

culiar in character because of the elasticity of the police power, but these characteristics do not apply to license taxes.

Viewed, therefore, from the standpoint either of reason or authority, the term "all taxes" must be held to include license taxes, and since the tax sought to be collected in this proceeding is not uniform upon the same class of subjects, is not based upon any assessment whatsoever, is not assessed according to value, and is such that there is no way of determining whether it violates the provision limiting the taxation to one per cent for territorial purposes, it cannot be sustained under the provisions of the Organic act.

The Circuit Court of Appeals, in the opinion referred to a provision contained in section 3 of the Organic act in support of the contention that it was the intention of congress that license taxes might be assessed without regard to the question of whether or not such taxes complied with the requirements contained in section 9. This provision reads as follows:

> "That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States, or to the game, fish and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the

> United States providing for taxes on business and trade, or to the act entitled, 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several acts amendatory thereof: Provided further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

It will be observed that this provision, taken as a whole, is a limitation upon the power of the legislature. Congress had enacted a law with a view of collecting revenue to meet the expense of the general government in administering the laws in the territory. It was deemed desirable to keep this law in force. Accordingly, a provision was inserted against its repeal by the territorial legislature and in order that this provision might not be given a broader construction than was intended for it, it was provided:

> "That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

The last mentioned clause, therefore, was a mere proviso inserted with a view of preventing misconstruction.

The Circuit Court of Appeals expressed the

opinion that it was a recognition of the power of the legislature to impose taxes and licenses. It may be conceded that by inserting this provision it was recognized that the legislature had the power to levy taxes and require licenses, but the power to levy taxes and require licenses is one thing and the power to levy license taxes without regard to the question of whether these taxes are levied in conformity with the limitations upon the taxing power contained in section 9, is quite another thing.

That the legislature has the power to levy taxes cannot be doubted. The recognition of that power in this proviso added nothing to the authority of the legislature in this regard, for the power to levy taxes existed under the provisions of section 9, independent of its recognition in this proviso. But while the power to levy taxes exists under the provisions of section 9, it must, as has already been pointed out, be exercised in conformity with the limitations imposed by the provisions of that section.

So. also, with reference to the power to require licenses. Licenses are required in connection with the regulation of those things which, to insure the public health, public morals or public safety, require regulation. They are required in connection with the exercise of the police power, and that the territorial legislature may exercise this power under the general grant of powers cannot well be

doubted. The recognition of the power to require a license, therefore, recognizes no power in the legislature that it would not possess without such recognition. Hence, the proviso does not affect the question under discussion one way or the other.

While it is not deemed material to this inquiry it may be noted that the Circuit Court of Appeals seem to have treated this recognition of the power to require a license as a recognition of the power to exact a license tax. In so doing the court placed upon the term "licenses" an erroneous construction. A license is one thing and a license tax is quite a different thing. One is required in the exercise of the police power and its object is regulation. If a fee is required, it cannot exceed in amount the cost actually incurred in connection with such regulation. The other is a revenue measure enacted under the taxing power. Its object is not regulation but the production of revenue to meet the general expense of government. The money exactions made under it are, as has already been pointed out, taxes in every sense of the word, and being taxes they are subject to the constitutional limitations imposed upon the taxing power, whenever these limitations extend to all taxes. The difference between a license and a license tax has been clearly pointed out by the courts in those cases where they have been called upon to construe grants of power to license. In these cases it has been uniformly held that a

grant of power to license does not include the power to require a license tax but confers the power merely to require a license for the purpose of regulation under the police power, and that the fees exacted in that connection cannot exceed the cost of regulation.

State v. Smith, 35 *Atl.* 506 (*Conn.*) 52 *Am. St. Rep.* 301;
Sunset Telephone & Telegraph Co. v. City of Medford, 115 *Fed.* 202;
In re Laundry Licenses, 22 *Fed.* 701;
Clark v. Brunswick, 43 *N. W. Law.*, 175;
Gache County v. Jensen, 61 *Pac.* 303.

It is needless to further discuss this proviso contained in section 3 of the Organic act, for in no event can it have any effect upon the principal point under discussion. That does not deal with the power of the legislature to levy license taxes as such, but deals with the power of the legislature to levy license taxes without regard to the question of whether the taxes so levied are uniform upon the same class of subjects, are assessed according to the actual value of the thing taxed and do not exceed in amount one per cent upon the assessed valulation if levied for territorial purposes.

Section 9 of the Organic act provides that all taxes must conform with these requirements, and it also contains a provision that all legislation, or

attempts at legislation, that do not conform to the requirements of that section, shall be void.

This provision requires us to construe section 9 by itself, and having found that the legislation in question does not conform to the provisions of that section, such legislation cannot be otherwise than void.

The proviso contained in section 3, which has been previously discussed, of course, in no sense validates a tax laid in violation of the express provisions of section 9 in the face of the mandate contained in section 9 that all legislation, or attempts at legislation, not in conformity with the provisions of that particular section, must be regarded as void.

Nor can there be any doubt as to the intention of Congress with reference to this matter when the Organic act as a whole is considered.

Section 9 contains a provision that no tax shall be levied for territorial purposes in excess of one per cent and the further provision that no tax shall be levied for municipal purposes in excess of two per cent. Obviously these provisions were inserted to protect the people of Alaska against over-taxation, not merely to protect them against excessive property taxes.

The mischief which Congress desired to guard against was over-taxation in any form not over-taxation in this or that particular form. Over-taxa-

tion is as great an evil when it results from one form of taxation as it is when it results from another form.

If it had been the intention of Congress that license taxes might be collected without regard to the question of whether they complied with the limitations placed upon the taxing power, under the provision of section 9, provision would have been made for definite limitations upon the exercise of the power to lay such taxes. Congress would not have been so extremely solicitous of protecting the people of the territory against an excessive property tax, if it were the intention to permit the assessment of license taxes without restraint and without limitation.

There is no reason why property should be protected in this regard if industry is to go entirely unprotected.

Furthermore, if it were held that license taxes could be imposed without restriction, the entire object of Congress in this regard could be evaded by laying an excessive tax on the business in which the property sought to be taxed was employed and thus the legislature could do in an indirect manner that which it could not do directly.

Under the present law in the territory, no property tax whatsoever is collected, the entire revenue for the use of the territory is collected by means of license taxes. There is no way of telling

whether the amount of these taxes assessed on the business exceeds one per cent of the value of the property employed in such business, because no assessment of such property is made.

If, therefore, the decision of the Circuit Court of Appeals is correct, the limitations placed by Congress upon the taxing power with so much precision and so much care have been entirely wiped away and set aside.

Section 9 of the Organic act also contains the following provision:

> "Nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

This provision also becomes entirely ineffective if taxes can be imposed upon industries without limitation and without restraint. Practically all of the Alaska fisheries and most of the larger mines are owned by non-residents of the territory. No property tax is levied in the territory nor is any substantial license tax collected, except from the mines and the fisheries, so that the property of these non-residents is indirectly required to pay nearly all of the expense of government within the territory.

Clearly, Congress did not insert in the Organic act the provision against the over-taxation of non-residents with a view that it should be evaded in this manner.

Again, viewing the Organic act as a whole, it will be observed that the limitations placed upon the taxing power not only are more rigid and exacting than those found in the Organic act of any other territory or the constitution of any of the states, but the legislative powers conferred upon the tertorial legislature are everywhere limited and circumscribed. The sparsely settled condition of the territory, its vast extent and other peculiar conditions not met with elsewhere, are the reasons that suggest themselves for thus limiting the power of the legislature.

A further reason is found in the fact that the representation in the legislature is not made to depend upon the population or wealth of the districts from which the members are elected, but each judicial division is given the same representation. The industries carried on in the territory are such that each is carried on in its own particular locality and not elsewhere, at least to any extent, so that a license tax on any industry falls on the particular locality only in which that industry is carried on. Hence, the temptation of working for and voting for a license tax on an industry not carried on in his own division is constantly held out to each member of the legislature. In addition to this, it must be observed that industries required to pay the license tax are those in which few, if any, of the members of the legislature have any personal or

pecuniary interest, so that under the present system the members of the legislature who are called upon to expend the money raised by taxation pay no portion of the taxes and contribute nothing to the amount expended. Every incentive to economy is thus done away with and every inducement to extravagance is held out.

As an evidence of how this system operates, it is but necessary to direct attention to the appropriations made by the last territorial legislature, which was in session in the spring of 1917, and which appropriated approximately $1,500,000.00.

It is but reasonable to assume that Congress had all of these matters in mind when it placed in the Organic act the limitations upon the taxing power and that these limitations, exacting though they may be, reflect in the broadest sense the wisdom of Congress and are such that they should be given full force and effect.

THE TAX SOUGHT TO BE COLLECTED IS NOT A LICENSE TAX BUT A SPECIFIC PROPERTY TAX

Should it be conceded, however, that the position taken by the Circuit Court of Appeals for the Ninth Circuit that license taxes may be col lected in Alaska without compliance with the provisions of Section 9 of the Organic act, is the correct one, it would not follow that the tax sought to be collected in this action can be sustained.

While a license tax which imposes a tax on a business or occupation in which property is employed, in many cases at least, is an indirect tax on the property itself, a license tax is, nevertheless, not a direct tax on property. It is a tax levied on a business or occupation and is distinguished from what is termed "property tax", in that, the latter is a tax assessed on tangible property; and where a tax is levied on tangible property it remains a property tax, although it may be denominated a license tax. This is the precise situation with reference to the tax now being considered.

That the tax is not a tax on the business of operating a fishery or a cannery, but is in fact a tax on the product of the fishery or cannery becomes at once apparent when the language of the act is considered. The act provides that those engaged in the business of operating a salmon cannery shall pay a tax of seven cents per case on sockeye and king salmon and one-half cent a case on hump-back, cohoe and chum salmon. It does not even provide that the tax shall be paid only on such salmon as are caught and packed at the cannery, for which the license is required. Under the act the tax imposed may be calculated on any fish owned or possessed by the person or corporation operating a cannery regardless of how such ownership or possession was acquired. But assuming that the legislature intended to tax only the salmon caught

and canned at the cannery licensed, the tax is still a tax on the product and not on the business.

Suppose the law provided that everyone engaged in the business of farming should pay a tax of a given amount on every bushel of grain produced; that every person engaged in the business of manufacturing stoves should pay a fixed amount on every stove manufactured; that every person engaged in the business of operating mines should pay a given amount on every ton of ore mined; no one would contend that the tax in any of the enumerated cases could be considered as a license tax on the business, but it would at once be conceded to be a property tax on the product. Yet a tax exacted from one carrying on the business of operating a cannery, at a fixed amount on every case canned, does not differ in any respect from any of the cases named. Indeed, if the product of any business or occupation could be thus taxed under the guise of taxing the business, all personal property might be so taxed, for all such property is the product of industry.

In those states where some or all of the constitutional provisions relating to taxation are expressly limited in their application to property taxes or where license taxes are expressly excepted from the operation of the constitutional provisions, the question of whether or not a given tax was a property tax or a license tax has frequently been

been passed upon by the courts and it has been uniformly held that taxes of the character now under discussion are specific property taxes although dominated license taxes by the legislature.

In Re Tax Delinquency in St. Louis County, 73 *N. W.* 970;
Standard Oil Co. v. Commonwealth, 82 *S. W.* 1020;
Pittsburg Etc. Railroad Co. v. State, 31 *N. E.* 435;
State v. Bengsch, 70. *S. W.* 710;
Minces v. Schoenig, 75 *N. W.* 711;
Pittsburg etc. Railroad Co. v. Pittsburg 60 *Atl.* 1077;
Brookfield v. Toory, 43 *S. W.* 387;
Ellis v. Frazier, 63 *Pac.* 642;
Livingston v. Albany, 41 *Ga.* 21;
Sims v. Parish of Jackson, 22 *La. Ann.* 440.

So, also, this court has held that a tax on the occupation of those engaged in the sale of designated articles was a tax on the articles themselves.

Brown v. Maryland, 12 *Wheaton*, 419;
Welton v. State, 91 *U. S.* 275.

Respectfully submitted,
J. A. HELLENTHAL,
HARVEY M. FRIEND.

IN THE

Supreme Court of the United States

ALASKA PACIFIC FISHERIES,
a Corporation,
Plaintiff in Error.

v.

TERRITORY OF ALASKA,
Defendant in Error.

No. 388

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
Statement of the Case	5
Argument on Motion to Dismiss Writ of Error	6
Argument on the Merits	24
Whether the Act of of the Territorial Legislature Violates the Provisions of the Federal Constitution	24
Whether the Act Deprives the Plaintiff in Error of Property Without Due Process in that it is Denied the Right to Follow its Business or Use its Property Until it Has Complied With a Condition the Performance of Which is Impossible	31
That the Act of the Territorial Legislature Violates the Provisions of the Organic Act	34

CITATIONS

Alaska Gold Mining Co. v. Territory of Alaska, 226 Fed. 64 31
Alaska Pacific Fisheries v. Territory of Alaska, 236 Fed. 52 34, 48
American Security & Trust Co. v. Commissioners of the District of Columbia, 224 U. S. 491 19

American Sugar Refining Co. v. New Orleans, 181 U. S. 277.. 9
Aztec Mining Co. v. Ripley, 151 U. S. 79 ..... 11, 12, 79
Baltimore v. Radecak, 49 Md. 217 30
Banger's Appeal, 118 Pa. St. 79 41
Bankers' Mutual Casualty Co. v. Minneapolis, St. Paul & St. Ste. M. R. Co.. 192 U. S. 371 9
Bayley v. General Fire Extinguisher Co. 53 L. Ed. 605..... 9
Bernarr McFadden v. U. S., 53 L. Ed. 801 ..... 9, 14, 15
Binns v. U. S., 194 U. S. 486 ..... 35, 50
Borgmeyer v. Idler, 159 U. S. 408 ..... 9, 18
Cary Mrf. Co. v. Acme Flexible Clasp Co. 187 U. S. 427..... 9
Chicago & N. W. Ry. Co. v. Dey, et al., Railway Commissioners 35 Fed. 866 33
Christianson v. King County 239 U. S. 356 ..... 15, 17
Church of Holy Trinity v. U. S., 143 U. S. 457 20
City of Brookfield v. Toory, 43 S. W. 387 42
Ellis v. Frazier, 63 Pac. 642 43
Ex parte Hurl, 49 Cal 557 45
In re Frazee, 63 Mich. 396 30
In re Carfinkle, 80 Pac. 188 45
In re Martin, 64 Pac. 43 45
In re Tax Delinquency in St. Louis County, 73 N. W. 970..... 43
In re Wo Lee, 26 Fed. 471 30
John J. Sesnon Co. v. U. S. 182 Fed. 573 35
McGhee v. State, 73 S. E. 276 45
Morrill v. State, 38 Wisc. 428 45
Munn v. Ill., 94 U. S. 113 50
Ohio Railroad Commission v. Worthington, 225 U. S. 101..... 17
People v. Coleman, 60 Am. Dec. 581..... 45
Pittsburg, Cincinnati & St. Louis R. Co. v. State of Ohio, 30 N. E. 435 42
Robinson v. Caldwell, 165 U. S. 359 9
Standard Oil Co. v. Commonwealth, 82 S. W. 1020 42
Standard Underground Cable Co. v. Attorney General, 19 Atl. 733 45
State v. Bixman, 62 S. W. 828 45
State v. French, 41 Pac. 1078 45
State v. Hammond Packing Co., 34 So. 368 45
Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397..... 13, 14, 15
Steamer Coquitlam v. U. S., 163 U. S. 346 13
Terre Haute v. Kersey, 64 N. E. 469 45
Weaver v. State, 15 S. E. 840 45
Willis v. Standard Oil Co., 52 N. W. 652 43
Yick Wo v. Hopkins, 118 U. S. 356 27

IN THE

Supreme Court of the United States

No. 388

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

v.

TERRITORY OF ALASKA,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF DEFENDANT IN ERROR

GEORGE B. GRIGSBY,
Attorney General of the
Territory of Alaska.

EMPIRE PRINTING COMPANY
JUNEAU, ALASKA

Supreme Court of the United States

ALASKA PACIFIC FISHERIES,
a Corporation,
Plaintiff in Error.

v.

TERRITORY OF ALASKA,
Defendant in Error.

No. 388

STATEMENT OF THE CASE

This is an action brought by the Territory of Alaska to recover taxes claimed to be due from the plaintiff in error under an Act of the Territorial Legislature of the Territory of Alaska.

The case was brought originally in the United States District Court for the District of Alaska, First Division. Judgment was rendered in said Court in favor of the Territory and thereupon a writ of error was sued out to the Circuit Court of Appeals for the Ninth Circuit. The judgment of the lower Court was affirmed by the Circuit Court of Appeals. Thereafter a petition for a writ of certiorari was filed in the Supreme Court by the plaintiff in error, which has been denied. Subsequently, and within the time allowed by law, a writ of error was sued out to this Court.

On the trial of this case in the lower Court, certain questions were raised which involved the construction and application of the Constitution of the United States and the constitutionality of the

law of the Territorial Legislature imposing the tax sought to be recovered. A motion has been filed in this Court by defendant in error to dismiss the case for want of jurisdiction. This motion has been presented upon written briefs and the Court has ordered further argument thereon in connection with the hearing on the merits.

ARGUMENT

I.

ON MOTION TO DISMISS WRIT OF ERROR

Section 134 of the Judicial Code provides that:

> "Section 134. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases writs of error and appeals shall lie from the District Court for Alaska, or from any Division thereof, to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders, and decrees of said Court shall be final in all such cases."

Section 247 of the Judicial Code provides that:

> "Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the District Court for the District of Alaska, or for any Division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in

all cases which involve the construction or Application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

It is the contention of plaintiff in error that, since this cause is one which involves the construction and application of the Constitution of the United States, it could have been taken direct to the Supreme Court of the United States by writ of error, and is therefore expressly excepted by the terms of Section 134 from those cases in which the decision of the Circuit Court of Appeal is made final.

Such a construction, and we concede that the language of Section 134 is susceptible of it, would lead to results so at variance with the intention of Congress and the aim and purpose of the Circuit Court of Appeals Act as to be absurd.

The aim and purpose of the Circuit Court of Appeals Act was to relieve the congestion of litigation in the Supreme Court by a distribution of jurisdiction. Is it consistent with this aim and purpose, or reasonable to suppose that it was the intention of Congress, that the right to successive appeals should exist in cases arising in Alaska which would not exist in the same class of cases or-

iginating in the District Courts of the United States?

Section 128 of the Judicial Code provides that:

> "Sec. 128. The Circuit Courts of Appeal shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in Section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in Sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the copywright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

This District Court of Alaska is a Court of general jurisdiction in civil, criminal, equity and admiralty cases, also having the jurisdiction of Circuit and District Courts of the United States.

A case exactly similar to this one might arise in any of the District Courts of the United States by reason of diversity of citizenship, and if constitutional questions should arise during the trial,

the judgment of the Circuit Court of Appeals would be final on appeal or writ of error.

In all cases arising in the District Courts of the United States under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in all admiralty cases, and in all ordinary cases of a civil nature in which diversity of citizenship is the sole ground of jurisdiction, the judgment of the Circuit Court of Appeals is final, even though constitutional questions may have arisen during the trial which would have warranted an appeal to, or writ of error from, the Supreme Court.

Many cases were cited in our opening brief to sustain this contention and are again listed for convenience, as follows:

Bernarr McFadden v. U. S., 53 *L. Ed.* 801;

American Sugar Refining Co. v. New Orleans, 181 *U. S.* 277; 45 *L. Ed.* 859;

Bagley v. General Fire Extinguisher Co., 53*L. Ed.* 605;

Carey Mfg. Co. v. Acme Flexible Clasp Co., 187 *U. S.* 427;

Spencer v. Duplan Silk Co., 191 *U. S.* 526;

Bankers' Mutual Casualty Co. v. Minneapolis, St. P. & St. Ste. M. R. Co., 192 *U. S.* 371;

Borgmeyer v. Idler, 159 *U. S.*, 408;

Robinson v. Caldwell, 165 *U. S.* 359; 41 *L. Ed.* 745.

Counsel for plaintiff in error contends for a construction of Section 134 of the Judicial Code which would put in force exactly the opposite rule in cases arising in Alaska. If his contention is sound, then in all cases arising in Alaska, of every kind and description, either under the patent laws, criminal laws, copyright laws, revenue laws, admiralty laws, in all civil suits in which the amount in controversy is $1,000, besides costs, the aggrieved party is entitled to successive appeals, to have the case reviewed first in the Circuit Court of Appeals and, if the result there be unfavorable, then again in the Supreme Court, the only condition of this right being that some question arise some time during the progress of the cause which involves the construction or application of the Constitution of the United States.

As stated before, this construction is contrary to the aim and purpose of the Circuit Court of Appeals Act. It is utterly opposed to the policy and theory of the cases cited above, interpreting Section 128 of the Judicial Code, with reference to the finality of judgments of the Circuit Court of Appeals in cases from the District Courts of the United States.

It is also absolutely inconsistent with the pre-

vious legislation of Congress respecting the finality of judgments of the Circuit Court of Appeals in cases arising in the Territories.

Section 15 of the Judiciary Act of March 3, 1891 (Circuit Court of Appeals Act), is as follows:

> "Sec. 15. That the Circuit Courts of Appeal, in cases in which the judgments of the Circuit Courts of Appeal are made final by this Act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the Supreme Courts of the several Territories as by this act they may have to review the judgments, orders and decrees of the District Courts and Circuit Courts, and for that purpose the several Territories shall, by the orders of the Supreme Court to be made from time to time, be assigned to particular circuits."

In *Aztec Mining Co. v. Ripley*, 151 U. S. 79, this Court said:

> "The Circuit Court of Appeals has no jurisdiction to review on appeal or error a judgment or decree of the Supreme Court of a Territory in a case which is 'not a case in admiralty, nor a case arising under the criminal, revenue or patent laws of the United States, nor a case between aliens and citizens of the United States or between citizens of the different States, for such case does not apply to either of the classes defined by Section 6 as

cases in which the judgments or decrees of the Circuit Court of Appeals should be final.' "

"Only in cases in which the judgments of the Circuit Court of Appeals are made final by the Judiciary Act of March 3, 1891, can that Court review the judgments of the Supreme Court of a Territory."

Syllabus, Aztec Mining Co. v. Ripley, 151 *U. S.* 79.

Nothing could be more indicative of the intent of the Act to distribute jurisdiction. The line of division is definite and clear.

Section 5 of the Act (Section 238, Judicial Code,) defines the cases appealable directly to the Supreme Court.

Section 6 of the Act (Section 128, Judicial Code) defines the appelate jurisdiction of the Circuit Court of Appeals and expressly designates the class of cases in which the judgments of the Circuit Court of Appeals are final.

Section 15 of the Act, above quoted, limits the appellate jurisdiction of the Circuit Court of Appeals to review the judgments of the Supreme Courts of Territories to those cases in which the judgments of the Circuit Court of Appeals are made final by Section 6 of the Act.

Furthermore, construing Section 15 of the Judiciary Code, this Court has said:

"The District Court of Alaska is to be

regarded as the Supreme Court of that Territory, within the meaning of the fifteenth section of the Act of March 3, 1891, and of the order of this Court assigning Alaska to the Ninth Circuit."

Steamer Coquitlam v. U. S., 163 *U. S.* 346.

Therefore, the judgments of the Circuit Court of Appeals were made final in all cases from Alaska reviewable by that Court.

Must Section 134 of the Judicial Code be construed to manifest the intention of Congress to go to the opposite extreme and to provide for successive appeals in all cases from Alaska involving constitutional questions? It seems to us that Section 134 should be construed with regard to the provisions of Section 247 and in accord with the aim and purpose of the Act and of previous legislation for the Territory.

The line of division between the appellate jurisdiction of the Supreme Court and that of the Circuit Court of Appeals is plainly expressed in Sections 134 and 247 of the Judicial Code, and no confusion would result except for the fact that this case involves both questions involving the construction and application of the Constitution of the United States, and other questions, so that, under authority of *Spreckles Sugar Refining Co. v. Mc-*

Clain, 192 U. S. 397, an appeal or writ of error might lie to or from either Court.

In harmony with *U. S. v. McFadden*, and the numerous other cases above cited, plaintiff in error, having elected to have this case reviewed in the Circuit Court of Appeals, is bound by the judgment of that Court.

On page 6 of the brief of the plaintiff in error, on the motion to dismiss the writ of error, is the following:

> "It has always been the policy of Congress to leave matters relating to the construction or application of the Constitution of the United States to this Court. If the decisions of two separate courts were made final upon matters requiring the construction or application of the Constitution of the United States, two separate lines of decision would soon arise with reference to the effect of that instrument.
>
> "The Constitution would ere long mean one thing in one Court and another thing in another. Owing to the peculiar fitness of this Court as the highest tribunal in the land, to pass upon all matters relating to the construction and application of the National Constitution, is has been the settled policy of Congress to leave such matters in all cases to the final judgment of this Court."

In support of this statement, counsel cites "*American Sugar Refining Company v. New Orleans*, 181 U. S. 277, *Spreckles Sugar Refining Com-*

pany v. McClain, 192 U. S. 307, and *Christianson v. King County*, 239 U. S. 356.

None of the cases cited bear out the contention of plaintiff in error.

In *American Sugar Refining Company v. New Orleans*, the Chief Justice says:

> "The jurisdiction of the Circuit Court rested on diverse citizenship and not on any other ground, and had the Circuit Court of Appeals gone on and decided the case, its decision would have been final and our interposition could only have been invoked by certiorari. This was so notwithstanding one of the defenses was the unconstitutionality of the ordinance."

In that case, the Circuit Court of Appeals had declined to take jurisdiction on the ground that constitutional questions had arisen after the jurisdiction of the Circuit Court attached.

In *Spreckles Sugar Refining Company v. McClain*, cited by counsel, this Court allowed the writ of error to the Circuit Court of Appeals for the reason that the jurisdiction of the lower Court was invoked on two grounds: First, because it was a revenue case and, second, because it arose under the Constitution and laws of the United States.

In *U. S. v. McFadden*, cited above, this Court comments upon the *Spreckles* case as follows:

> "But it is argued that the right to this

writ of error is supported by the decision of this Court in *Spreckles Sugar Refining Co. v. New Orleans*, 192 U. S. 397. An examination of that case, however, shows that the exact decision has no relevancy to the question now before us. The language of the opinion should be interpreted in the light of the facts of the case. The plaintiff there brought an action against the Collector of Internal Revenue to recover certain taxes imposed by the revenue laws of the United States, paid by it under protest. The plaintiff's claim, as stated in its declaration, was twofold. First, that the taxes were not due under the Act as properly construed, and, second, that the Act itself was unconstitutional. The jurisdiction, therefore, of the Trial Court was invoked upon two grounds: First, because it was a revenue case and, second, because it arose under the Constitution and laws of the United States, which means that plaintiff's case thus arose (citing *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149.")

On page 410 of the opinion in the *Spreckles* case, this Court says:

"The judgment of the Circuit Court of Appeals is not final within the meaning of the sixth section of the Act, in a case which although arising under a law providing for internal revenue and involving the construction of that law, is yet a case also involving from the outset, from the plaintiff's showing, the

construction or application of the Constitution or the constitutionality of an Act of Congress."

It is evident that the Spreckles case in no way conflicts with the cases heretofore cited by defendant in error.

In *Christianson v. King County*, cited by counsel, it was held that the decision of the Circuit Court of Appeals was not final for the reason that the jurisdiction of the Court below did not depend solely upon the citizenship of the respective parties but that it appeared from the amended bill or complaint that the controversy involved the construction of Amendments 5 and 14 of the Constitution of the United States and of an Act of Congress prescribing the authority of the Territorial Legislature. This case is also in harmony with the cases cited in support of the motion to dismiss the writ of error.

The only other case cited by counsel for plaintiff in error is *Ohio R. R. Commission v. Worthington*, 225 U. S. 101.

This case is also a case in which the jurisdiction of the Federal Circuit Court rested on two grounds, one being diverse citizenship, the other ground involving alleged infractions of the Federal Constitution.

Counsel for plaintiff in error fails to make any distinction between cases in which the juris-

diction of the trial court was invoked upon constitutional grounds and those cases in which constitutional questions arose during the trial. In the former class of cases this Court has always held that the decision of the Circuit Court of Appeals is not final, and in the latter class has always uniformly followed the rule expressed in *Borgmeyer v. Idler*, 159 U. S. 408, as follows:

> "Other questions subsequently arising in a case in which the jurisdiction of the Federal Court depends at the commencement of the action upon the citizenship of the parties cannot give appellate jurisdiction to the Supreme Court to review the judgment of the Circuit Court of Appeals."

This Court has uniformly held that in order for a constitutional question to prevent the judgment of the Circuit Court of Appeals being final, it must be such a question as wholly or partially vested the trial court with jurisdiction in the first place.

We believe we have demonstrated that the construction of the statute in question contended for by plaintiff in error is inconsistent with the aim and purpose of the Circuit Court of Appeals Act, in that it places a burden upon the Supreme Court which it is not called upon to bear, either in cases from United States District Courts or from any other Territory; that such a construction is incon-

sistent with the judicial decisions of this Court construing Section 128 of the Judicial Code with reference to the finality of judgment in the Circuit Court of Appeals in cases from the United States District Courts; that it is inconsistent with, and entirely opposite to, the theory of previous legislation limiting the jurisdiction of the Circuit Court of Appeals over cases arising in the Territories, including Alaska, to those cases in which the judgments of that Court are final.

We contend, on the contrary, for a construction in harmony with the aim and purpose of the Circuit Court of Appeals Act; in accord with the decisions of this Court interpreting Section 128 of the Judicial Code and the previous legislation governing cases from Alaska, and maintain that such a construction, though perhaps not so narrow and literal as that contended for by plaintiff in error, does no violence to the language of the Act.

In *American Security & Trust Co. v. Commissioners of the District of Columbia*, 224 U. S. 491, 56 L. Ed. 857, a similar question was decided by this Court, construing the sixth sub-division of Section 250 of the Judicial Code, which gives the Supreme Court jurisdiction to re-examine any final judgment of the Court of Appeals of the District of Columbia in cases in which the construction of any law of the United States is drawn in question by the defendant.

The Court says:

> "Of course there is no doubt that the special Act of Congress was, in one sense, a law of the United States * * * but all cases in the District arise under Acts of Congress and probably it would require little ingenuity to raise a question of construction in almost any one of them. If, then, the words have the meaning given them by the applicant, the appellate jurisdiction of this Court has been largely and irrationally increased. We believe Congress meant no such result.
>
> "A well known example of construing the statute not to include a case that indisputably was within its literal meaning but was believed not to be within the aim of Congress is *Church of the Holy Trinity v. U. S.* 143 U. S. 457."

So, in this case, if the words in question have the meaning given them by counsel for plaintiff in error, "the appellate jurisdiction of this Court has been largely and irrationally increased" over cases arising in Alaska and decided in the Circuit Court of Appeals.

We contend for the construction which limits the appellate jurisdiction of this Court as the same was limited by Section 15 of the Circuit Court of Appeals Act; that is, we maintain that the judgment of the Circuit Court of Appeals is final in all cases arising in Alaska.

Section 134 provides:

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in Section two hundred forty-seven * * * writs of error and appeals shall lie from the District Courts for Alaska * * * to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders and decrees of said Court shall be final in all such cases."

"In all such cases" the judgment of the Circuit Court of Appeals shall be final.

What cases? The answer is obvious. All cases reviewable in the Circuit Court of Appeals.

Counsel for plaintiff in error contends that the language means "the judgments, orders and decrees of the Circuit Court of Appeals in Alaska cases shall be final in all cases other than those in which an appeal will lie direct to the Supreme Court," and not final in cases where an appeal could have been taken direct to the Supreme Court, but this construction contradicts the very language of the section. The latter class, that is, cases appealable to the Supreme Court, are not by the terms of the section appealable to the Circuit Court of Appeals. Section 134 makes two classes of cases cognizable in the Circuit Court of Appeals. First, those not cognizable in the Supreme Court, and,

second, criminal cases. This case was cognizable in the Circuit Court of Appeals because, and only because, it was not cognizable in the Supreme Court as to the questions in controversy entitling it to be heard in the Circuit Court of Appeals. Involving both classes of questions, however, it could, under authority of the *Spreckles* case, cited above, have been appealed to either Court. But in harmony with the rule laid down in *McFadden v. U. S.* and the other cases decided by this Court interpreting Section 128 of the Judicial Code, in similar situations the appellant is compelled to elect the appellate tribunal and be bound by its judgment..

We suggest that the following be adopted as the proper construction of Section 134:

> The Circuit Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of error and appeal final judgments and decrees of District Courts of Alaska in all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in Section 247, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, and the judgments, orders and decrees of said Court shall be final in all cases so reviewable therein.

This construction is in accord with all the decisions above cited and in harmony with the

spirit of the Circuit Court of Appeals Act and the apparent intention of Congress to prevent, rather than encourage, successive appeals; to limit, rather than enlarge, the appellate jurisdiction of the Supreme Court.

It was not the intention of the Judiciary Act, as suggested by counsel for plaintiff in error, that in all cases from Alaska involving constitutional questions the Circuit Court of Appeals is to be regarded as an intermediate tribunal and that successive appeals, first to the Circuit Court of Appeals and then to the Supreme Court, be allowed. Litigants, on the contrary, in cases appealable to either Court should be compelled to select and abide the judgment of the appellate tribunal chosen. This would be required in a similar case from any of the United States District Courts proper. How much more reason, then, for this policy in Alaska, where the prevailing party is already compelled to defend his judgment at almost prohibitive expense of time and money in an appellate Court sitting thousands of miles distant, protracting considerably the usual period of the law's delay, and necessitating, in practically every instance, the employment of expensive counsel outside the Territory.

The burden on litigatants, in addition to the burden on this Court, is a consideration which affords a most cogent reason why it cannot be

considered that Congress intended to make the Circuit Court of Appeals an intermediate tribunal in this class of cases.

If the argument of this motion has been somewhat prolix, we assure the Court that it is because, in our opinion, the question of determining this case on this motion is of the gravest importance, involving the establishment of a precedent limiting the appellate jurisdiction of this Court in a large class of cases, and not because we approach with any lack of confidence a discussion of this case on the merits.

II.

ON THE MERITS

WHETHER THE ACT OF THE TERRITORIAL LEGISLATURE VIOLATES THE PROVISIONS OF THE FEDERAL CONSTITUTION

The first contention of plaintiff in error is that the Act confers arbitrary power to deprive the plaintiff in error of its property. The provision of the Act discussed under this head is as follows:

> "That the licenses provided for in this Act shall be issued by the Clerk of the District Court, or any sub-division thereof, in compliance with the order of the Court or

> Judge thereof, duly made and entered, and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for, and remonstrances against, the granting of licenses and the action of the Court thereon."

It cannot be ascertained, from the face of this provision, that it is intended to vest in the Court any arbitrary power to grant or refuse a license for any particular business or occupation. Apparently licenses for a number of different kinds of business are contemplated. Some of them may be such that any person would be entitled to obtain, on payment of the required fee, as a matter of right. To such, whatever inference might be drawn from the words "recommendations for, and remonstrances against, the granting of licenses and the action of the Court thereon," could have no application.

A reading of the entire Act, however, discloses that no business or occupation made the object of a tax is of such a nature as to create any necessity for judicial discretion in granting or refusing a license for the same. Apparently, there was no necessity for a record of recommendations or remonstrances.

But this history of the passage of the Act clearly explains how this clause came to be inserted. In providing the means of raising revenue, the Legislature adopted the license system

originally devised by Congress, Act of March 3, 1899, amended June 6, 1900.

The Territorial Legislature in adopting the license system of taxation already in operation also adopted the procedure for obtaining or granting licenses. The provision above quoted and complained of by plaintiff in error was copied *verbatim* from the corresponding provision in the Act of Congress of June 6, 1900. It is contained in Section 2572, Compiled Laws of Alaska.

In the list of lines of business taxes under the Act of Congress (Section 2569, Compiled Laws of Alaska) are included breweries, wholesale and retail liquor dealers, which are included in Section 2577 also, conditions to be complied with before licenses shall issue for the same. One of the conditions imposed is the obtaining of the consent of a majority of citizens of a certain class.

The provision requiring a record of recommendations and remonstrances and the action of the Court thereon was applicable to liquor licenses only; otherwise Congress must be credited with an intention to grant to the Court the power to refuse a person a license for a grocery store or meat market. No such absurd intention will thus be credited.

The Legislature, as stated before, copied Section 2572, Compiled Laws of Alaska, *verbatim* in drawing their License Act of 1913. Congress had,

however, in the Organic Act prohibited the Legislature from exercising any control over the liquor business. Consequently, with the lines of business taxed under the Territorial Acts, the liquor business is not and could not be included.

It is thus apparent that the clause relating to recommendations and remonstrances was unnecessarily and inadvertently included in the Territorial Act and without any intention whatever, except to follow as closely as possible a method of procedure theretofore successfully followed.

Business licenses have issued for seventeen years in accordance with this procedure, yet there is not a record in any court in Alaska of a recommendation or remonstrance for or against an ordinary license, nor any record of any Court ever refusing any person an ordinary business license.

The validity of a statute imposing a license or tax depends upon its actual effect and operation and not merely upon its phraseology. The Court must look to the essence as well as the form.

21*AM. & Enc. of Law 2nd Ed.*, 791-792.

Plaintiff in error affects to find in the case of *Yick Wo v. Hopkins*, 118 U. S. 356

a conflict on this proposition with the decision of the Circuit Court of Appeals in this case. But the cases are easily distinguished.

The ordinance in question in the *Yick Wo*

case plainly intended to lodge with the Board of Supervisors the power to refuse a permit to conduct a laundry in a wooden building. That the statute here discussed does not grant any such or similar power, and is not intended to, has been clearly shown. The San Francisco ordinance has no reference to the procedure to be followed in obtaining licenses but is simply a police regulation. The Alaska Statute is part of the Revenue Act and has only to do with the procedure for licensing business and collecting the revenue. No license tax was required by the San Francisco ordinance.

The Alaska statute reads:

> "That the license provided for shall be issued by the Clerk of the District Court in compliance with the order of the Court."

The San Francisco ordinance reads, substantially:

> "It shall be unlawful for any person to conduct a laundry, etc. * * * without a permit obtained from the Board of Supervisors."

In the Territorial Act, the acts of the Court and the Clerk of the Court are intended to be purely ministerial.

Furthermore, the Court, in *Yick Wo v. Hopkins*, while it severely condemns the ordinance in question, did not, as stated by plaintiff in error,

hold it absolutely void, but simply held that there was an improper exercise of power under it.

The following is from the opinion in *Yick Wo v. Hopkins* (After discussing the opinion of the Court in *City of Baltimore v. Radecak*, 49 Md. 217, the Court said, 118 U. S. 373):

> "This conclusion and the reasoning on which it is based are deductions from the face of the ordinance as to its tendency and the ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afforded, of unequal and unjust discrimination in their administration.
>
> "For the cases present the ordinances in actual operation, and the facts shown establish an administration directly so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to petitioners as to all other persons by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States:

> "Though the law itself be fair on its face and impartial in appearance, *yet if it be applied and administered by public authority with an evil eye and an unequal hand*, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. * * * The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the fourteenth amendment of the Constitution."

But plaintiff in error in this case has not been refused a license.

What we have said with reference to the *Yick Wo* case is equally applicable to the cases of *In re Wo Lee*, 26 Fed. 471, *Baltimore v. Radecak*, 49 Md. 217, *In re Frazee*, 63 Mich. 396, and to all cases cited by plaintiff in error under this head. All of the ordinances interpreted in these decisions were police regulations and had no reference to the matter of collecting revenue by license.

The plaintiff in error did not apply for a license, as has been suggested by the Circuit Court of Appeals, and need have no fear that the Fifth Amendment will be violated in this case, or that its offer to pay its taxes when due will be met by any arbitrary refusal on the part of the Court.

III.

WHETHER THE ACT DEPRIVES THE PLAINTIFF IN ERROR OF PROPERTY WITHOUT DUE PROCESS, IN THAT IT IS DENIED THE RIGHT TO FOLLOW ITS BUSINESS OR USE ITS PROPERTY UNTIL IT HAS COMPLIED WITH A CONDITION THE PERFORMANCE OF WHICH IS IMPOSSIBLE

The Circuit Court of Appeals, in an opinion rendered in the case of *Alaska Gold Mining Co. v. Territory of Alaska*, 236 Fed. 64, fully discusses this question.

The brief of plaintiff in error on this proposition is devoted entirely to attacking the Act as a penal statute. In the case above cited, the Circuit Court of Appeals held that the Act created an obligation to pay the taxes, and that by Section 4, Chapter 76, Laws of Alaska, 1915, enacted by the Territorial Legislature, a civil remedy for their collection was afforded. The chief complaint of plaintiff in error is that it has not been prosecuted criminally and cannot be. Nothing is stated in his brief as to the civil liability created by the statute. The fact that the civil liability is separable from the criminal

responsibility did not seem to occur to plaintiff in error. If prosecuted criminally, the argument of plaintiff in error might be pertinent.

It is clear that the main purpose of the Act was to impose a certain tax on the business of canning fish, the amount of the tax depending on the amount of fish canned. The penalties provided were an inducement to pay the tax. There is abundant authority sustaining the Circuit Court of Appeals in its holding that the civil liability was created. Probably the most authorative is the following:

> "There are some contracts implied by law. Of this nature are, first, such as are necessarily implied by the fundamental constitution of government to which every man is a contracting party. And thus it is that every person is bound and hath agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. For it is a part of the original contract entered into by all mankind who partake of the benefit of society to submit in all points to the municipal constitution and local ordinances of that State of which each individual is a member. Whatever, therefore, the law orders one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge."
>
> 3 *Blackstone's Commentaries*, 160.

Numerous authorities sustain the general

proposition that a statute, though void for uncertainty or other reasons as to its penal provisions, may be invoked to effect a civil remedy.

> "Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable, in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates, this is a question which is a proper one for a jury."
>
> 8 *Amer. & Eng. Enc. of Law*, 935.

In *Chicago and N. W. Ry. Co. v. Dey, et al. Ry. Commissioners*, 35 Fed. 866, Judge Brewer distinguishes the penal from the other provisions of the Act and holds (p. 777) that, notwithstanding its possible unconstitutionality as to the penal provisions, yet such unconstitutionality furnishes no basis for enjoining the commissioners from enforcing other portions.

The Circuit Court of Appeals has held the Act in question valid for all purposes, but, even if impossible of enforcement as to its penal provisions, there is no occasion for holding it void for all purposes. It should receive a sensible construction, if possible, in order to effectuate its main purpose, that is, the imposition of a license tax.

IV.

THAT THE ACT OF THE TERRITORIAL LEGISLATURE VIOLATES THE PROVISIONS OF THE ORGANIC ACT

The contention of plaintiff in error under this head is that the Act of the Territorial Legislature imposing certain taxes on business and trades violates the provisions of Section 9 of the Organic Act, which is as follows:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum of the assessed valuation of the property therein in any one year."

This proposition is fully and ably discussed by the Circuit Court of Appeals in *Alaska Pacific Fisheries v. Territory of Alaska*, 236 Fed. 52.

We will summarize as briefly as possible what we have to say in addition.

Congress, by the Act of March 3, 1899, amended June 6, 1900, adopted as the means of raising revenue for the support of the government of Alaska, a system of license taxation on business and trades. This system was adopted in lieu of property taxation on account of peculiar conditions

existing in Alaska making the latter system inexpedient, expensive and cumbersome.

This Court, in *Binns v. U. S.*, 194 U.S. 486, held that Congress in thus legislating for the Territory did not violate Section 8 of Article I. of the Constitution, but had plenary power and was unfettered by constitutional restrictions as to uniformity, etc.

The Act of March 3, 1899, was also upheld in *John J. Sesnon Company v. U. S.*, 182 Fed. 573.

By Section 3 of the Organic Act of the Territory, being the Act of August 24, 1912, creating a Territorial Legislature for Alaska, the Territory was forbidden to alter, amend, modify or repeal laws of Congress providing for taxes on business and trades.

Further limitations on the legislative power of the Territory are contained in Section 3 of the Organic Act, which have a bearing on its construction. Therefore, we will quote the portion containing them:

> "Provided that the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States, or to the game, fish and fur seal laws and laws relating to fur bearing animals in the United States applicable to Alaska, *or to the laws of the United States providing for taxes*

on business and trade, or to the Act entitled, 'An Act to Provide for the Construction and Maintenance of Roads, Establishment and Maintenance of Schools, and Care and Support of Insane Persons in the District of Alaska, and for Other Purposes,' approved January 27, 1905, and the several Acts amendatory thereof. *Provided further, that this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses.*"

According to the law existing at the time of the passage of the Organic Act, all moneys derived from the tax on business and trades inside of incorporated towns was turned over to the city governments to be expended by them for school and municipal purposes.

In accordance with the Act of January 27, 1905, referred to in Section 3 of the Organic Act, above quoted, all moneys derived from taxes on business and trades outside of incorporated towns was applied as follows: Twenty-five per cent. for the maintenance of school outside of incorporated towns; five per cent. for the care of the insane; and seventy per cent. for the construction of roads.

By the Act of February 6, 1909, so much of the Act as provided for the expenditure of five per cent. of the license moneys collected outside of incorporated towns for the care and maintenance of insane persons was repealed and thereafter such

five per cent. was applied to the establishment and maintenance of public schools.

It is apparent, therefore, that the reason Congress limited the power of the Territorial Legislature over the Congressional laws for taxes on business and trades was because they desired to preserve their control and protection of the Government schools and the construction of Government roads. It has been shown that none of the moneys derived from license taxes was devoted to the general expenses of governing the Territory, but all was applied to the particular purposes designated above; that is to say, since the passage of the Act appropriating these moneys to these particular purposes. A very light tax was deemed sufficient for these purposes.

With the intention of preserving intact the Congressional supervision of schools and Government roads, Congress expressly forbade the Legislature to amend its laws creating a tax on business and trades. Having effected this purpose, the last proviso in Section 3 of the Organic Act was added, as follows:

> "This provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

It is significant that this latter proviso was added in the Senate after the bill left the House, then later consented to by the House.

Now, it is evident—

First. That it occurred to the Senate that the limitation on the power of the Legislature with reference to the Business and Trade License Act might be construed to prevent the Territory imposing any license taxes whatever. No other reason can account for expressly granting the Territory the power to impose other and additional taxes and licenses.

Second. That this proviso permitting the taxing of business and trades was not intended as a grant under the police power for the purpose of regulation, because such power is granted by Section 9 of the Organic Act in the words, "Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States." Plainly, no one would construe the limitation on the power of the Legislature to amend the Congressional Business and Trade License Act as affecting this police power. Consequently, it is evident that Congress intended the proviso as an express grant to the Legislature of the power to impose a tax on business and trades as a means of raising revenue for general purposes.

And also, Congress must have intended that this power to tax should extend to the lines of business already taxed by the Government, and for two reasons:

First, for the reason that those lines of business already taxed were not taxed at all for purposes of general revenue but only for the creation of a special fund, as above shown.

Second, for the reason that to exempt the lines of business already taxed by Congress, which included nearly every industry and occupation known at that time as capable of bearing the burden of a tax, would have left the Territory with very little to work on, which would have been inconsistent with the apparent intention of Congress to afford the Territory a means of revenue.

It being apparent that Congress intended by this proviso to grant to the Legislature the power to tax business and trades.

To tax them for the purposes of revenue and not under the police power for purposes of regulation.

To tax the same lines of business already taxed, as well as others.

And, since Congress had long exercised the power of taxing these subjects unrestricted by constitutional provisions, it follows that—

In delegating this power to the Territory, it was intended by Congress that the Territory should be to an equal degree unhampered and free from constitutional provisions as to unformity, within reasonable limits.

This conclusion being reached, none of the

arguments advanced by plaintiff in error have any more application to the tax law passed by the Legislature than they would have had to the original tax law passed by Congress, which was, as remarked before, held valid in the *Binns* case.

Congress, therefore, either delegated to the Legislature the same power formerly exercised by itself or it delegated nothing by the proviso under consideration.

The only limitation placed upon the Legislature was that the tax imposed by Congress for municipal purposes, maintenance of schools and building of roads should remain intact.

But counsel for plaintiff in error argues that Section 9 of the Organic Act providing that all taxes shall be uniform and the assessments according to actual value applies to this license taxation. If so, it abolishes it. Uniformity in respect to occupation taxes and uniformity as to property taxes are unrelated. Occupation taxes never were based on assessment or valuation. They were not so based under the Congressional Act. When Congress, in a measure, relinquished Alaska from direct control and gave her a local government, it delegated to the local government all the powers formerly exercised by itself not expressly withheld, and expressly delegated its system of license taxation in its entirety.

That Section 9 of the Organic Act is not in-

tended as any limitation upon the power of the Legislature to raise revenue by license taxation is further borne out by the fact that Section 9 is the general provision common to the organic acts of all the Territories in almost the identical terms.

The proviso contained in Section 3, however, is peculiar to Alaska.

Counsel for plaintiff in error has cited many cases to support the theory that the clause in Section 9 of the Organic Act providing that all taxes shall be uniform upon the same class of subjects and shall be assessed according to value applies not only to taxes levied directly upon property, but also to licenses on business and trades imposed for purposes of revenue.

A few of the cases cited bear out the contention of plaintiff in error, but those decision are from States in which there is not constitutional authority for imposing license taxes for purposes of revenue. A great many of the cases cited, however, are not in point at all.

For instance, *Banger's Appeal*, 108 Pa. St. 79, held invalid a city ordinance which attempted to impose an occupation tax upon all officers, posts of profit, trades and occupations, based on the amount of yearly income arising therefrom, under authority of a legislative Act enacting

> "That it shall be lawful for cities of the third class to provide by ordinance for the

assessment and collection of taxes, not exceeding one percentum upon the assessed valuation in any year, on all persons, real and personal property, and all other matters and things within the said respective cities taxable for State and county purposes."

It is apparent that the tax held illegal in this case was purely and simply an income tax and not authorized by the terms of the Act, and the court so held.

In *Standard Oil Co. v. Commonwealth*, 82 S. W. 1020, the tax in question was upheld as a police regulation, though the Court intimates in the opinion that it would not have been constitutional if considered as a revenue measure.

In *Pittsburg, Cincinatti & St. Louis R. R. Co. v. State of Ohio*, 30 N. E. 435, the Act in question required every corporation or company operating a railroad, or any part of a railroad, within the State to pay the Commission of Railroads and Telegraphs a fee of $1.00 per mile for each mile of track operated by it within the State. This fee was not exacted as a condition of doing business or obtaining a license. The Court properly held this fee to be a direct tax on property not levied according to value nor uniform on all property in the State and consequently unconstitutional under the laws of the State.

In *City of Brookfield v. Toory*, 43 S. W. 387, it was held that under the constitutional uniformity

clause of the State, a city ordinance levying a tax of one per cent. per annum upon the cash value of the stocks of merchants in the city was a property tax and not an occupation tax and therefore invalid because not uniform upon all the personal property of said city.

In *Ellis v. Frazier*, 63 Pac. 642, it was held that a statute imposing a tax of $1.25 on bicycles was not an occupation tax but a direct tax. This Act authorized the Board of County Commissioners to levy a special tax upon each bicycle within its jurisdiction, except such as were kept for sale. Obviously, this was a property tax and did not purport to be a tax on any business or occupation and properly held unconstitutional as violating the uniformity clause in the Constitution of the State.

In *Willis v. Standard Oil Co.*, 52 N. W. 652, a statute authorizing the imposition of a fee for the inspection of illuminating oils was upheld as a police regulation.

In *In re Tax Delinquency in St. Louis County*, 73 N. W. 970, the Court held that an Act permitting mining companies to pay, in lieu of property taxes levied under the general tax law requiring unifirmity and taxation according to value, certain specified amounts upon ore mined, to-wit, on copper, five cents per ton, and upon iron, one cent per ton, was a violation of a constitutional requirement.

It is apparent that none of the above decisions cited by plaintiff in error has the remotest relation to the question under consideration. But it is idle to discuss these or the other decisions cited of the various State courts holding certain taxes imposed unconstitutional by reason of the constitutional provisions of those States, because it is not the case, as stated in the brief of the plaintiff in error, that any of those States have similar laws with a similar history granting to their Legislatures the power to raise money by license tax. The law granting this power to Alaska is *sui generis*, adopted in the first place by Congress on account of the exceptional conditions existing in the Territory, and reenacted by the Legislature on account of the continuance of those conditions.

The contention of plaintiff in error amounts to this:

> "That whenever a constitutional requirement exists to the effect that taxes must be uniform and this requirement is not expressly limited in its application to property taxes but is unaccompanied by an express provision under which license taxes are exempted from its operation, the courts have held that the requirement applies to all taxes alike, including license taxes, as well as taxes upon property."

The Circuit Court of Appeals has stated in its opinion that many cases can be found to the

contrary of this proposition. We cite the following:

> "The requirement in a State Constitution that taxation shall be uniform and equal refers particularly to the taxation of property and does not necessarily prohibit the imposition of a license tax on a business or avocation."

Ex. p. Hurl, 49 Cal. 557.
People v. Coleman, 60 Am. Dec. 581;
McGhee v. State, 17 S. E. 276;
Weaver V. State, 15 S. E. 840;
Wiggins Ferry Co. v. East St. Louis, 102 Ill., 560;
Terre Haute v. Kersey, 64 N. E. 469;
In re Martin, 64 Pac. 43;
State v. Hammond Packing Co., 34 So. 368;
State v. Bixman, 62 S. W. 828;
State v. French, 41 Pac. 1078;
Standard Underground Cable Co. v. Attorney General, 19 Atl. 733;
In re Garfinkle, 80 Pac. 188;
Morrill v. State, 38 Wisc. 428.

We consider further discussion of this proposition as unnecessary because—

Every objection that can be made to the tax in question on this ground could as well have been made to the license system adopted by Congress,

which has been held by the courts not subject to these objections, and because we consider that Congress has, in effect, expressly exempted the license taxes which the Territory is authorized to impose from the operation of the uniformity clause of the Organic Act.

Since it has been clearly shown that it was the intention of Congress that the Territory should have the benefit of a system proven by actual test to be adapted to the needs of the Territory, it follows—

That Section 9 of the Organic Act providing that "all taxes shall be uniform upon the same class of subjects and the assessments shall be according to the actual value thereof," was not intended to limit the proviso which expressly authorizes the license system.

It is not reasonable to suppose that Congress would emphasize a grant of power in the proviso with the intention of having the benefits to be derived from it utterly destroyed by the general provisions of the Act.

Viewing the proposition in this light, it is immaterial whether this cannery tax be viewed as an occupation tax or , as claimed by plaintiff in error, in effect a property tax. All taxes on business which has to do with manufacturing or selling goods, or even on occupations which do not, have been held in the last analysis to be property taxes,

for in the former case, the tax must have a tendency to enhance the price of the goods or diminish the profit thereon, and in the latter, to either raise the price of the service or lessen the income of the trade or profession. But in the practical application of the terms, as generally understood and interpreted by the courts, a property tax is one imposed directly on property, while a business or occupation tax is one imposed on a pursuit or calling without regard to the use of property in connection therewith.

The point in this case is that Section 9 of the Organic Act was not intended to apply to the license system.

In the cases cited by counsel, where such taxes have been held to be subject to similar constitutional provisions, the effect of the decision is invariably to do away with the license system, for obviously it is incapable of being adapted to statutes requiring uniformity, based on assessments according to value. In other words, these decisions hold that the license tax system itself is unconstitutional unless expressly authorized by the Constitution.

Our Organic Act, which is our Constitution, *does expressly authorize the license tax system.*

While the naked language of the pertinent sections of the Organic Act of Alaska leads irresistably to this conclusion, as is pointed out in the opinion of the Circuit Court of Appeals in *Alaska Pacific*

Fisheries v. Territory of Alaska, 236 Fed. 58, we are not confined to the Act itself in construing the legislative intent.

By the Act of Congress, August 24, 1912, known as the Organic Act, Congress gave Alaska a Territorial form of government, with an elective Legislature, granting the power to the Territory to raise revenue by taxation. As was said by the Circuit Court of Appeals in the case above cited:

> "The history of the passage of the Organic Act shows that somewhat peculiar conditions were presented with respect to providing for the fiscal needs of the Territory. No general property tax laws obtained. Revenue would have to be raised and naturally some scheme of license taxation of the extensive industries carried on in the Territory presented itself for adoption. * * * The Congressional records disclose that after discussion it was decided not to abridge too far the transfer of power in the Legislature to adopt its own scheme of levying taxes and licenses * * * Congress reserving to itself, by Section 20 of the Organic Act, the possible exercise of the power to nullify any law passed by the Territorial Legislature."

Theretofore all revenues collected by the Government for the expense of maintaining a government for Alaska were raised by a system of license taxation adopted by Congress on March 3, 1899, amended June 6, 1900 (Compiled Laws of Alaska,

Section 2569; 31 Stat. at L. 331). Since the adoption of this system by Congress, not a dollar of revenue has been raised by a tax on property in Alaska, except in incorporated towns for municipal purposes..

The reasons which guided Congress in adopting this license method of taxation were the difficulties to be encountered and large expense incurred in pursuing any other method, owing to the vast area, sparse and widely scattered population and lack of transportation facilities.

When Congress passed the Organic Act of Alaska in August, 1912, the same condition existed, though in a lesser degree, but the transportation facilities were, and are still, inadequate, the population mostly residing in incorporated towns, while the bulk of assessible property of large value lay far outside of them. The Organic Act prohibits the Legislature from organizing a county form of government. For these several reasons, a revenue system based on real and personal property taxation was still inexpedient and impracticable. Consequently, while the Organic Act grants to the Territory the power of taxing property, it at the same time leaves it free to adopt the license tax system devised by Congress as best adapted to Territorial conditions.

Thus it is seen that this case involves the validity of the revenue system first devised by Con-

gress for Alaska and upheld in the case of *Binns v. U. S.*, cited above, and later adopted by the Territorial Legislature, and which has been in active and successful operation for the past nineteen years.

We urge the Court to apply to this case the rule laid down by Chief Justice Waite:

> "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the express will of the Legislature should be sustained."

Munn v. Ill., 94 U. S. 113.

Respectfully submitted,

GEORGE B. GRIGSBY,
Attorney General for the Territory of Alaska.

Since this case involves the construction and application of the Constitution, by § 247, Jud. Code, a writ of error may be taken from the District Court for Alaska direct to the Supreme Court of the United States. If it had involved constitutional questions only, this court would have had exclusive jurisdiction to review the judgment of the District Court, and the Circuit Court of Appeals would have had none. But as the case involved a number of other questions along with the constitutional ones, under the authority of *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, it was reviewable alternatively by this court or the Circuit Court of Appeals.

Under § 134, Jud. Code, the judgment of the Circuit Court of Appeals is final in all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court, as provided in § 247. But since this is a case in which a writ of error would lie to the Supreme Court under the provisions of § 247, it is expressly excepted by the terms of the act from those cases in which the judgment of the Circuit Court of Appeals is made final. The language of the act is not that the judgments of the Circuit Court of Appeals for the Ninth Circuit shall be final in "all cases" but in "such cases." The use of the word "such" limits the class of cases in which the judgments of the Circuit Court of Appeals are made final to the cases previously in the same sentence dealt with; and since the cases of the character dealt with in § 247, to which the case at bar belongs, are expressly excepted from those in which the decision is made final, the decision in the case at bar is not final.

Owing to the peculiar fitness of this court to pass upon all matters relating to the construction and application of the Constitution, it has been the settled policy of Congress to leave such matters in all cases to the final judgment of this court. The decision of the Circuit Court of Appeals is not made final, and, the requisite amount

being involved, it may be reviewed by this court under the provisions of § 241, Jud. Code. *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397; *Christianson* v. *King County*, 239 U. S. 356; *Ohio R. R. Commission* v. *Worthington*, 225 U. S. 101, 104, 105.

The provisions of §§ 247 and 134, Jud. Code, governing appeals and writs of error from the District Court for Alaska, differ widely from the sections of the Judicial Code involved in *Macfadden* v. *United States*, 213 U. S. 288, and the *McClain Case*, *supra*, in that the finality of judgments of the Circuit Court of Appeals is not made to depend upon the sources of jurisdiction, but upon the character of the case. The District Court for Alaska is a court of general law and equity jurisdiction and its judgments are reviewable without regard to the question of how the case arose. *In re Cooper*, 143 U. S. 472. But in those other cases, arising in the District Courts of the United States, the judgments of the Circuit Court of Appeals were made final by the express provision of § 128, because of the sources of the initial jurisdiction, peculiar to District Courts of the United States, and without regard to the constitutional questions that became involved.

Mr. George B. Grigsby, Attorney General of the Territory of Alaska, for defendant in error.

Mr. Justice Day delivered the opinion of the court.

These cases were argued and submitted together, and may be disposed of in a single opinion.

In case No. 117 the action was brought in the District Court for Alaska to recover monies alleged to be due under a statute imposing a tax upon prosecuting the business of fishing by means of fish traps in the waters of Alaska. The defendant, the Alaska Pacific Fisheries, filed an

answer in which it set up that the act of the Alaska legislature, under which the suit was brought, was void under the act of Congress creating the legislature of Alaska, and under the Constitution of the United States, and set up other defenses not involving the Constitution.

In case No. 118 the Territory brought an action to recover taxes claimed to be due under an act of the legislature of the Territory of Alaska for prosecuting the business of fishing for and canning salmon in Alaska. With other defenses the constitutionality of the law was contested by the defendant.

Judgment in each case was rendered in the District Court in sums in excess of $500.00 against the Alaska Pacific Fisheries. Upon error to the Circuit Court of Appeals for the Ninth Circuit the judgments of the District Court were affirmed. 236 Fed. Rep. 52, 70.

Motions to dismiss the writs of error were filed by the Attorney General of the Territory upon the ground that the judgments of the Circuit Court of Appeals are final. Consideration of the motions was passed to the hearing upon the merits. A determination of the motions involves a construction of sections of the Judicial Code regulating appeals and writs of error in the District Court for Alaska and the Circuit Court of Appeals for the Ninth Circuit. Section 134 of the Judicial Code (36 Stat. 1134) provides:

"In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court

of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals."

Section 247 (36 Stat. 1158) of the Code provides:

"Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district courts to the Supreme Court."

Section 241 (36 Stat. 1157) of the same Code provides:

"In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

It is the contention of the plaintiff in error that under § 241 the judgments of the Circuit Court of Appeals are not final and there is a right to a writ of error from this court, the matter in controversy exceeding one thousand dollars, besides costs.

The District Court of Alaska is a court with the jurisdiction of United States district courts and general jurisdiction in civil, criminal, equity, and admiralty causes. (4 U. S. Comp. Stats. § 3564.) In that court these suits were brought to recover the taxes in question. As already indicated, the answer in each of the cases raised an issue as to the constitutionality of the statute under which the taxes were levied, and the question which we are now to consider is: Are the judgments of the Circuit Court of Appeals final? In interpreting the sections of the statutes controlling this matter resort must be had to the language of the laws, to the history of the legislation, and the decisions of this court interpreting the Circuit Court of Appeals Act, now substantially carried into the Judicial Code, in so far as the same are applicable.

The sections of the Judicial Code pertaining to Alaska had their origin in prior federal legislation concerning the Territory. The Committee on revision of the laws in its report to Congress said of § 134:

"This section is drawn from section 202 of the Criminal Code for Alaska [Act of March 3, 1899, ch. 429, 30 Stat. L. 1307], and from sections 504 and 505 of the Civil Code [Act of June 6, 1900, ch. 786, 31 Stat. L. 414, 415] and states what was the existing law on the subject. Those portions of the sections which authorize the taking of writs of error and appeals direct to the Supreme Court are revised in section 247. Formerly capital cases went direct to the Supreme Court. Section 247 was so modified as to take from the Supreme Court its jurisdiction of capital cases, the effect being to vest the right to review on a writ of error in the Circuit Court of Appeals. This is accomplished, so far as this section is concerned, by the omission of the words 'other than capital' after the words 'and in all criminal cases.'" (Note by Committee on Revision, 5 Fed. Stats. Ann., p. 644, note to § 134.)

Sections 504 and 505 of the Alaska Civil Code as they

stood before the enactment of the Judicial Code are found in 31 Statutes at Large, pp. 414, 415. These sections are as follows:

"Sec. 504. Appeals and writs of error may be taken and prosecuted from the final judgments of the district court for the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: In prize causes and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; and that in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars the United States circuit court of appeals for the ninth circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the district court."

"Sec. 505. The judgments of the circuit court of appeals shall be final in all cases coming to it from the district court, but whenever the judges of the circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any case pending before the circuit court of appeals on writ of error to or appeal from the district court, judges may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the questions and propositions certified to it, and its instruction shall be binding upon the circuit court of appeals."

A reading of these sections shows that two classes of cases were provided for: (1) Prize cases, and cases involving the Constitution and treaties; (2) other cases wherein the amount involved exceeds five hundred dollars. In the first

ALASKA PACIFIC FISHERIES *v.* TERRITORY OF ALASKA.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 117, 118. Argued December 19, 20, 1918.—Decided March 3, 1919.

The provisions of the Judicial Code governing the review of cases coming from Alaska are to be construed in the light of their legislative history and of the Judiciary Act of 1891, as construed by this court. P. 58.

Under §§ 134, 247, and 241, of the Judicial Code, when a case involving constitutional as well as other issues is taken from the District Court for Alaska to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the latter court is not reviewable in this court by writ of error but only by certiorari. P. 61.

Writs of error to review 236 Fed. Rep. 52, 70, dismissed.

The cases are stated in the opinion.

Mr. J. A. Hellenthal, with whom *Mr. Harvey M. Friend* was on the briefs, for plaintiff in error:

class of cases appeal or writ of error was to this court direct. In the second class of cases the writ of error or appeal was to the United States Circuit Court of Appeals for the Ninth Circuit. Under § 505 the judgments of the Circuit Court of Appeals were made final in all cases coming to it from the district court, with the provision that the Circuit Court of Appeals might certify propositions of law to this court in any cases pending before it upon writs of error or appeals. The like provision as to the finality in the Circuit Court of Appeals was, we think, carried into the Judicial Code in § 134 thereof, and a writ of error or appeal to this court was allowed where the Federal Constitution was involved, under the provisions of § 247. In § 134, as in the Alaska Code from which we have quoted, the judgment of the Circuit Court of Appeals was made final "in all such cases," that is, in cases in which the section permitted appeals or writs of error to the Circuit Court of Appeals.

It is true that § 134 begins by reference to cases other than those which may come to this court, and might be construed to allow appeals to the Circuit Court of Appeals for the Ninth Circuit only in cases which could not be brought directly to this court. But, bearing in mind the sources of the legislation which was enacted into the Judicial Code and the interpretation which this court has placed upon the Circuit Court of Appeals Act of 1891, we are led to the conclusion that it was not the intention of Congress to give practically two appeals in the class of cases which we are now considering. Under § 5 of the Circuit Court of Appeals Act, 1891, c. 517, 26 Stat. 826, direct appeals might be taken from the district courts or circuit courts to this court in cases which involved the construction or application of the Constitution of the United States, and where such was the only matter involved, an appeal could not be taken to the Circuit Court of Appeals. *Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305, 318. But in cases wherein issues were involved affecting the

construction and application of the Constitution, as well as others upon which the case might go to the Circuit Court of Appeals under the Circuit Court of Appeals Act, two appeals were not allowed, and the judgment of the Circuit Court of Appeals was final if the case was taken there, and the jurisdiction originally invoked rested solely upon grounds which by § 6 of the Circuit Court of Appeals Act (§ 128, Judicial Code) made its judgment final. *Macfadden* v. *United States*, 213 U. S. 288; *Robinson* v. *Caldwell*, 165 U. S. 359; *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277; *Boise Water Co.* v. *Boise City*, (No. 2), 230 U. S. 98.

Under the original Alaska Act, cases involving the application of the Constitution were directly reviewable in this court, and those reviewable by the Circuit Court of Appeals for the Ninth Circuit were by the terms of the act made final in that court. The Judicial Code, which is primarily a codification of former statutes, carried the provisions of these sections into that code with the change which made all criminal cases, capital as well as others, final in the Circuit Court of Appeals. *Itow* v. *United States*, 233 U. S. 581.

We think Congress in enacting the Judicial Code contemplated no change as to the finality of the judgments of the Circuit Court of Appeals for the Ninth Circuit in cases taken to that court from the District Court of Alaska.

The plaintiff in error might have taken a writ of error from this court to the District Court. (§ 247.) It did not choose to do so, and as the cases involved issues other than those relating to the Constitution, sued out a writ of error from the Circuit Court of Appeals. By the terms of § 134 the judgment of that court is made final.

The contention that the effect of this construction is to make the Circuit Court of Appeals a court of final jurisdiction in cases involving questions of the construction and

application of the Constitution, is met by the suggestion that this court has ample power under the Judicial Code to review judgments of the Circuit Court of Appeals, made final in that court, by writs of certiorari. (§ 240.)

Reaching the conclusion that the judgments of the Circuit Court of Appeals were final in these cases, it follows that the writs of error must be

Dismissed.